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Constitutional End Games: Making Presidential Term Limits Stick

ROSALIND DIXON[†] & DAVID LANDAU[‡]

Presidential term limits are an important and common protection of constitutional democracy around the world. But they are often evaded because they raise particularly difficult compliance problems that we call “end game” problems. Because presidents have overwhelming incentives to remain in power, they may seek extraordinary means to evade term limits. Comparative experience shows that presidents rely on a wide range of devices, such as formal constitutional change, wholesale constitutional replacement, and manipulation of the judiciary to get around permanent bans on reelection. In this Article, we draw on this experience to show that, in many contexts, weaker bans on reelection for consecutive terms, rather than permanent bans on any reelection, are the best response to the end game problem. Would-be authoritarian presidents are more likely to comply with term limits that force a temporary exit from the presidency because they hold open the prospect of an eventual return to power. Furthermore, a ban on consecutive reelection will allow alternative political forces to strengthen and make substantial democratic erosion less likely. In this sense, the United States’ oft-cited presidential term limit, which allows two consecutive terms in office, but prohibits all future reelection, may not be the best model for preserving democracy.

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INTRODUCTION

Presidential term limits are a common feature in democratic constitutions worldwide. By our own calculations, over 80% of presidential and semi-presidential constitutions in force today have presidential term limits.¹ Presidential term limits are common in constitutional democracies because they are often seen as fundamental for the preservation of constitutional democracy. Where presidents are able to remain in office indefinitely, comparative experience shows that they can consolidate enormous amounts of power that vitiate checks and balances by institutions such as legislatures and courts.² While elections may continue to be held, they often become increasingly non-competitive, as presidents amass formal and informal resources and use institutions like the judiciary to undermine the opposition. In the United States, although formal presidential term limits date only from the Twenty-Second Amendment, which was passed in 1947, many modern commentators now see the limits as a core protection of the democratic order.³ As we will show, despite its continued reputation as an international gold standard, the U.S. presidential term limit is vulnerable to term limit evasion in key respects.

Presidents have very strong incentives to circumvent constitutional term limits in order to remain in power. A study by Mila Versteeg and her co-authors has recently shown that presidents, since 2000, have sought to evade term limits in roughly 25% of cases.⁴ Where presidents try to evade their term limit, they succeed about two-thirds of the time.⁵

Presidents evade term limits through a variety of routes. Most commonly, many presidents seek a formal amendment to the term limit; in other cases, they induce courts to reinterpret the term limits or even to excise them entirely from

1. See *infra* Table 1. Other studies have reached similar results. For example, Ginsburg, Melton, and Elkins found that, between 1789 and 2006, about 60% of presidential and semi-presidential constitutions have had presidential term limits; this rises to over 75% for constitutions in force in 2006. See Tom Ginsburg et al., *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807, 1835–36, 1839 fig.1 (2011). In a study of 92 presidential and semi-presidential systems between 1992 and 2006, Gideon Maltz found that 87 had some form of presidential term limit. The relevant 92 countries included almost all key presidential democracies—those with a population of more than two million people which had minimal norms of political openness. The 99 “regimes” in those 92 countries included 47 democracies and 52 competitive or electoral authoritarian regimes. Gideon Maltz, *The Case for Presidential Term Limits*, 18 J. DEMOCRACY 128, 128–29 (2007).

2. See generally David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013) (pointing out that there is a degree of abuse of power if the president may remain in office indefinitely); Maltz, *supra* note 1 (explaining the adoption of presidential term limits after presidential power and the ongoing presidential power abuse in countries that have yet to adopt a term limit).

3. See, e.g., Aziz Huq & Tom Ginsberg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 143–44 (2018) (arguing that the Twenty-Second Amendment and Article V cut off one key route towards authoritarianism in the United States).

4. See Mila Versteeg et al., *The Law and Politics of Presidential Term Limits Evasion*, 120 COLUM. L. REV. (forthcoming 2020) (documenting cases and techniques of evasion since 2000).

5. See *id.*

the constitutional order.⁶ Because of the frequency of evasion attempts, presidential term limits raise special challenges to democratic constitutionalism.

More than any other feature of a democratic constitution, presidential term limits create limited incentives for compliance. One of the important insights in constitutional scholarship in recent years is the degree to which many constitutional norms effectively become self-enforcing, or self-stabilizing, over time because they often serve as a basis for valuable forms of *coordination* between different political parties or government officials.⁷ Life-long bans on reelection limits, however, remove almost all incentives for presidents to engage in co-operation of this kind.

Faced with such limits, incumbent presidents face a form of “end period” or “end game” problem. Compliance with term limits means that, in the short-run, incumbent presidents are certain to lose the power and privileges associated with high electoral office, and, in the long-run, gain only limited or uncertain reputational benefits.⁸ In many fragile democracies, political parties will also be insufficiently strong and independent to exert pressure on a president to leave office. Instead, they may actively encourage the president to extend their term in office.

What is the response to this problem? One possibility, as some recent work has suggested, is to give up the game entirely, and to remove term limits from constitutions in contexts where they are likely to prove ineffective as constraints on presidents.⁹ But this solution throws the baby out with the bath water. It gives up on a tool that is important for the preservation of democratic governance simply because compliance is problematic.

Another response, which we have discussed extensively in recent work, is to entrench term limits by requiring especially demanding procedures to change them.¹⁰ In the extreme, term limits are sometimes made completely unamendable; less dramatically, constitutions can require special procedures like heightened supermajorities or referenda before term limits can be altered. These design solutions are sometimes helpful, but do not make the compliance problem go away. Indeed, in some circumstances, these demanding or special procedures to amend the term limits may worsen the end game problem because these procedures heighten the pressure on presidential leaders to seek other routes to eliminate term limits.

6. *See id.*

7. *See, e.g.,* Tonja Jacobi et al., *Judicial Review as a Self-Stabilizing Constitutional Mechanism*, in *COMPARATIVE JUDICIAL REVIEW* 185 (Erin F. Delaney & Rosalind Dixon eds., 2018); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011).

8. *See* Bruce Baker, *Outstaying One's Welcome: The Presidential Third-Term Debate in Africa*, 8 CONTEMP. POL. 285, 287 (2002).

9. *See* Ginsburg et al., *supra* note 1, at 1855–66.

10. *See* Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438 (2018).

The optimal solution, we assert here, is to focus on *temporary* or *consecutive*, rather than *permanent*, bans on reelection. Consecutive bans, which prohibit consecutive reelection after one or more terms, require leaders to leave power periodically, but allow a return after one or more terms out of power. In other words, consecutive bans are “soft,” “flexible,” or “weak” term limits that limit the scope of consecutive presidential reelection but allow non-consecutive reelection.¹¹

Consecutive bans, as compared to permanent bans, have a key advantage. By giving presidents greater incentive to comply with democratic constitutional requirements, consecutive bans ameliorate the end game problem. Presidents who know they may be able to return to power later are more likely to leave power in the first place.

At the same time, pushing powerful incumbents out of power, even temporarily, will be crucial in preventing the erosion of democracy. When presidents re-contest an election, they no longer enjoy the benefits of incumbency, and social and political conditions will often have changed. Voters may no longer see the president as necessary or indispensable to their well-being. Other members of a president’s party may also have gained strength and an independent reputation, such that the party itself has a greater incentive and ability to support a broader range of candidates.

Following this introduction, this Article is divided into seven parts. Part I outlines the existing scholarly literature on the relationship between term limits and democracy. Part II explains the prevalence and design of different kinds of term limits. Part III outlines the special problems of compliance posed by presidential term limits, and the empirical evidence of term limit evasion drawn from around the world over recent decades, particularly in Latin America and Africa. Part IV explores the causes and consequences of evasions of term limits.

Parts V, VI, and VII deal with solutions. Part V explains and defends our proposal for weaker, consecutive bans on reelection as a solution to the end game problem. The proposal is rooted in the successful use of non-consecutive term limits in several countries.

Part VI deals with an important caveat to our proposal: the problem of shadow presidents, or, in other words, circumstances where non-consecutive bans induce presidents to leave power formally but maintain power informally. For example, consider Russia, where Vladimir Putin temporarily left the presidency between 2008 and 2012 but continued to exercise considerable power

11. Branko Milanovic et al., *Political Alternation as a Restraint on Investing in Influence: Evidence from the Post-Communist Transition* (World Bank Dev. Research Grp., Working Paper No. 4747, 2008). This is in line with the work of political researchers, such as Cain and Lopez, who suggest that the effectiveness of term limits is deeply dependent on questions of design and institutional setting. See Bruce E. Cain, *The Varying Impact of Legislative Term Limits*, in LEGISLATIVE TERM LIMITS: PUBLIC CHOICE PERSPECTIVES 21, 22 (Bernard Grofman ed., 1996); Edward J. López, *Term Limits: Causes and Consequences*, 114 PUB. CHOICE 1, 29 (2003).

as both prime minister and party leader throughout his “absence.”¹² To be effective, non-consecutive term limits require the creation of incentives for presidents to move onto other non-partisan roles and the development of limits that prevent proxy rule by a president’s family members or close associates.

Part VII briefly discusses three other proposals raised by recent constitutional design scholarship: the proposal to scrap term limits completely and rely instead on substitutes; the proposal to focus on popular enforcement as a way to protect term limits; and the proposal to allow changes to term limits only on a prospective-only basis such that it does not benefit the incumbent. While some of these proposals are complementary to our own and have considerable promise, they all raise problems from the standpoint of constitutional design.

Finally, this Article concludes by considering the U.S. term limit provision in light of the arguments developed in this Article. The United States’ presidential two-term limit is highly entrenched because Article V makes the entire U.S. Constitution extremely difficult to change, and generally gives the minority party the ability to block that change.¹³ However, comparative experience shows that this very rigidity may increase the incentives of presidents to find other routes, such as manipulation of the judiciary, to achieve their goals. Thus, the United States’ presidential term limit is more vulnerable to democratic erosion than is commonly assumed.

The U.S. Constitution does not deal with the end game problem as effectively as a weaker, or non-consecutive term limit. This may become a matter of immediate concern in the United States, given that a myriad of commentators have noted how the country currently appears to be particularly vulnerable to democratic erosion.¹⁴ It also suggests that the United States’ two-term presidential term limit may be a poor model for presidential systems abroad, despite its popularity (it is one of the most commonly used presidential term limit found in the world today)¹⁵ and the United States’ continued reputation for democratic stability.¹⁶

12. See J. L. BLACK, *THE RUSSIAN PRESIDENCY OF DMITRY MEDVEDEV, 2008–12: THE NEXT STEP FORWARD OR MERELY A TIME OUT?* 12 (2015); Christian Need & Matthias Schepp, *The Puppet President: Medvedev’s Betrayal of Russian Democracy*, SPIEGEL ONLINE (Oct. 4, 2011, 3:51 PM), <https://www.spiegel.de/international/world/the-puppet-president-medvedev-s-betrayal-of-russian-democracy-a-789767.html>.

13. See Huq & Ginsburg, *supra* note 3, at 143–44.

14. See *id.* at 165 (arguing that “there is a present danger of constitutional retrogression” in the United States). See generally CAN IT HAPPEN HERE? *AUTHORITARIANISM IN AMERICA* (Cass R. Sunstein ed., 2018) (containing a series of essays on the United States’ vulnerabilities to authoritarianism); STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018) (pointing out various ways in which the United States may be vulnerable to global pathways of democratic erosion).

15. See Ginsburg et al., *supra* note 1, at 1836.

16. See *infra* Table 1.

I. WHY TERM LIMITS? TERM LIMITS AND DEMOCRACY

Presidential term limits have a wide range of defenders and critics. Defenders of term limits often point to several arguments in favor of such limits.¹⁷

A. DEMOCRACY AND THE ADVANTAGES OF TERM LIMITS

One argument in favor of term limits is that their existence may help draw more people into office. This argument has more force in some contexts than others (for example, in local and state elections, where there is a greater chance of participation by ordinary citizens, than say in national elections) and intersects with arguments for increasing the representation of women and racial minorities in political elections.¹⁸ Generally, the argument reflects deeper philosophical commitments to participatory forms of government and decision-making by all citizens. As such, the argument is sometimes labelled populist in nature.¹⁹ In the current climate of illiberal populism, it is perhaps better understood as an argument for more citizen participation in democratic self-government.

A second argument focuses on the behavior of existing representatives and their tendency to vote in their own narrow self-interest, or that of their constituents, as opposed to the broader public interest.²⁰ Term limits can help reduce pressure on legislators to vote with reelection in mind because it “frees” them of “career considerations” or eliminates the need to win reelection. Thus, legislators are given the scope to engage in reasoned deliberation and decision-making, or “republican” forms of debate and representation.²¹ Some political scientists further suggest that term limits will reduce overall government expenditures, especially inefficient forms of expenditure designed to ensure the reelection of specific representatives.²²

17. See Bruce E. Cain & Marc A. Levin, *Term Limits*, 2 ANN. REV. POL. SCI. 163, 167–72 (1999).

18. See, e.g., Mark P. Petracca, *A Legislature in Transition: The California Experience with Term Limits* 19 (Inst. Governmental Studies, Working Paper No. 96-19, 1996).

19. See Cain & Levin, *supra* note 17, at 168–69; Robert Kurfirst, *Term-limit Logic: Paradigms and Paradoxes*, 29 POLITY 119, 123–24 (1996).

20. This, of course, reflects more general tensions within democratic theory about the nature of democracy and the broader role of legislators. See generally RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003); JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

21. See HARVEY C. MANSFIELD, JR., AMERICA’S CONSTITUTIONAL SOUL (1991); GEORGE F. WILL, RESTORATION: CONGRESS, TERM LIMITS, AND THE RECOVERY OF DELIBERATIVE DEMOCRACY (1992); Cain & Levin, *supra* note 17, at 170; Ginsburg et al., *supra* note 1, at 1822; Kurfirst, *supra* note 19, at 125–26. For empirical support for this idea, see, for example, Holger Sieg & Chamna Yoon, *Estimating Dynamic Games of Electoral Competition to Evaluate Term Limits in U.S. Gubernatorial Elections*, 107 AM. ECON. REV. 1824 (2017); Daniel J. Smith et al., *Long Live the King? Death as a Term Limit on Executives 8–9* (Feb. 22, 2018) (unpublished manuscript) (on file with authors).

22. See Timothy Besley & Anne Case, *Does Electoral Accountability Affect Economic Policy Choices? Evidence from Gubernatorial Term Limits*, 110 Q.J. ECONOMICS 769 (1995); Timothy Besley & Anne Case, *Incumbent Behavior: Vote-Seeking, Tax-Setting, and Yardstick Competition*, 85 AM. ECON. REV. 25 (1995); Timothy Besley & Anne Case, *Political Institutions and Policy Choices: Evidence from the United States*, 41 J. ECON. LITERATURE 7 (2003). But see López, *supra* note 11.

The most important modern argument in favor of presidential term limits—and the one emphasized in this Article—is that term limits have the capacity to protect democracy and democratic competition by reducing the advantages that an incumbent possesses in democratic elections and the strength of an incumbent’s individual personal rule.²³

Incumbents enjoy a range of advantages in democratic elections. For example, they generally enjoy a stronger reputation or name-recognition among voters, compared to their competitors. John Lott describes these advantages as the product of a prior “investment in brand name capital” that is both “sunk” and “non-transferable,” and that can create an effective barrier to entry by political challengers.²⁴ Voters may also be inherently biased toward incumbents because they may perceive less risk associated with incumbents than with challengers.²⁵

In addition, incumbents may have greater access to state resources, the support of the media and interest groups, and the ability to rely on forms of clientelist or patronage politics to ensure reelection.²⁶ In hybrid or electoral authoritarian regimes, incumbents may benefit from the active support of state media outlets and the ability to use both the civil and criminal law to intimidate and harass the political opposition and its supporters. The advantages incumbents enjoy are not the same across all political systems. As Nic Cheeseman notes, U.S. incumbents often benefit from strong name recognition, whereas African incumbents rely more heavily on patronage networks.²⁷ However, there is strong empirical evidence that incumbent legislators and executive actors enjoy advantages as a result of their incumbency worldwide.

In the United States, the incumbent reelection rate was approximately 97% in the House of Representatives and 93% in the Senate in 2016.²⁸ At the state

23. Some political scientists further suggest that this gives incumbents opportunities for “rent extraction.” Term limits can also potentially limit this kind of rent extraction both directly and indirectly—by reducing incumbent reelection, and by limiting the timeframe over which incumbents can reach agreements to engage in log-rolling or rent-sharing behavior. See Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 138 (1988).

24. John R. Lott, Jr., *The Effect of Nontransferable Property Rights on the Efficiency of Political Markets: Some Evidence*, 32 J. PUB. ECON. 231 (1987); see also John R. Lott, Jr., *Brand Names and Barriers to Entry in Political Markets*, 51 PUB. CHOICE 87, 89–90 (1986).

25. See M. Daniel Bernhardt & Daniel E. Ingberman, *Candidate Reputations and the “Incumbency Effect,”* 27 J. PUB. ECON. 47, 49 (1985). The counter-argument is of course that in some elections, voters are looking for change and will thus, tend to be biased toward challengers.

26. See Nic Cheeseman, *African Elections as Vehicles for Change*, 21 J. DEMOCRACY 139, 145–46 (2010); John N. Friedman & Richard T. Holden, *The Rising Incumbent Reelection Rate: What’s Gerrymandering Got to Do with It?*, 71 J. POLITICS 593, 596 (2009); Ginsburg et al., *supra* note 1, at 1820; Maltz, *supra* note 1, at 131–35.

27. See Cheeseman, *supra* note 26, at 140, 145–46.

28. Kyle Kondik & Geoffrey Skelley, *Incumbent Reelection Rates Higher than Average in 2016*, RASMUSSEN REP. (Dec. 15, 2016), http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_kyle_kondik/incumbent_reelection_rates_higher_than_average_in_2016; see also Andrew Gelman & Gary King, *Estimating Incumbency Advantage Without Bias*, 34 AM. J. POL. SCI. 1142 (1990).

level, sitting governors enjoyed an 80% reelection rate.²⁹ For presidents, the reelection rate was lower: of twenty-six presidents who ran for reelection in a general election, only sixteen, or 62%, won a second consecutive term.³⁰ But this pattern is not replicated in other presidential systems, where incumbents seem to have larger advantages.

In Latin America, Javier Corrales and Michael Penfold found that, between 1998 and 2006, sitting presidents enjoyed a 90% chance of winning a second consecutive term, and an 83% chance of subsequent or indefinite reelection, such that there was effectively a 62.8% increased chance of reelection for presidential incumbents.³¹ Incumbency also affected the margin of victory in presidential elections; it increased the margin of a president's victory over their nearest rival by approximately 11.2%,³² and was the strongest factor in predicting both the probability and margin of victory for presidential elections.³³

In Africa, Gideon Maltz likewise found that, in elections between 1992 and 2006, incumbent presidents were re-elected at a rate of 93%.³⁴ The incumbent reelection rate is so high in Africa that, when combined with patterns of ongoing authoritarian rule, only twelve sub-Saharan countries between 1989 and 2010 experienced a change in presidential leadership through democratic elections.³⁵ Since then, there have been only three notable instances of a change in presidential leadership as a result of democratic elections in which incumbents were eligible to run: Nigeria and Zambia in 2015,³⁶ and Ghana in 2016.³⁷ As Cheeseman notes, this is not simply due to the significant number of electoral or competitive authoritarian systems in Africa.³⁸ Even when these countries are excluded, incumbents won reelection in 64% of elections.³⁹

29. Kondik & Skelley, *supra* note 28.

30. See Michael Medved, *For U.S. Presidents, Odds for a Second Term Are Surprisingly Long*, DAILY BEAST, <https://www.thedailybeast.com/for-us-presidents-odds-for-a-second-term-are-surprisingly-long> (last updated July 13, 2017, 1:20 PM) (reporting 15). President Obama is the 16th. See Michael E. Purdy, *Only 30% of U.S. Presidents Served 2 Full Terms*, PRESIDENTIAL HISTORY (Jan. 16, 2013), <https://presidentialhistory.com/2013/01/only-30-of-u-s-presidents-served-2-full-terms.html>. Of the other 17 previous presidents, 5 died while in office, 7 declined to run for reelection, and 5 failed to gain their party's nomination. PRESIDENTS, <https://www.whitehouse.gov/about-the-white-house/presidents/> (last visited Jan. 24, 2020).

31. Javier Corrales & Michael Penfold, *Manipulating Term Limits in Latin America*, 25 J. DEMOCRACY 157, 163 (2014).

32. *Id.* at 164.

33. See *id.* at 162–64.

34. Cheeseman, *supra* note 26, at 139–40; Maltz, *supra* note 1, at 134.

35. Cheeseman, *supra* note 26, at 139.

36. See *Africa's 2015 Election Experiences Present Dilemmas for 2016 Polls*, CONVERSATION (Jan. 26, 2016, 11:02 PM), <https://theconversation.com/africas-2015-election-experiences-present-dilemmas-for-2016-polls-53312>.

37. Yomi Kazeem, *Ghana Has Elected Nana Akufo-Addo as Its New President*, QUARTZ AFR. (Dec. 9, 2016), <https://qz.com/858481/ghana-decides-nana-akufo-addo-has-been-elected-as-ghanas-new-president/>.

38. See Cheeseman, *supra* note 26, at 142.

39. *Id.*

Term limits can significantly reduce the advantage of incumbency in democratic elections. In the United States, there is strong evidence that term limits tend to increase the competitiveness of legislative elections. Kermit Daniel and John Lott, for example, found that term limits had a strong and significant effect on a range of measures of competitiveness in state legislative elections, including who won, who was defeated, the margin between the top two candidates, and the number of unopposed races.⁴⁰

In a global context, there is likewise evidence that term limits promote an increase in political competition, as well as alternation in individual rule. A transition in political leadership often weakens the dominant political party in a competitive authoritarian regime such that it is less able to engage in tactics designed to undermine true political competition, such as electoral intimidation, voter registration fraud, and vote tampering.⁴¹ A new leader of a party also generally has less electoral name recognition and respect than the outgoing president.⁴² New party leaders may even be selected in part because they are not seen to pose a serious threat to the ongoing power and prestige of the outgoing president. This gives opposition parties a significantly greater chance of success in elections against successor candidates than against incumbents.

Two leading examples, highlighted by Maltz, are the changes in political control of the presidency in Croatia, in 2000, and Kenya, in 2002.⁴³ In Croatia, President Franjo Tudjman and his Croatian Democratic Union had been in power since 1990, but when Tudjman died, his political successor failed to reach the runoff stage at subsequent presidential elections.⁴⁴ In Kenya, President Daniel Arap Moi ruled from 1978 to 2002.⁴⁵ When Moi left office in 2002, at the end of the formal term limits he agreed to in the 1990s, his party lost control of the presidency, and Mwa Kibaki was elected to office.⁴⁶ Moi's successor, Uhuru Kenyatta, did not enjoy the same popular support or appeal as Moi, and many commentators believe that Moi in fact chose Kenyatta because of this weakness, understanding that it would make him dependent upon Moi.⁴⁷

These patterns are also borne out by quantitative studies of presidential reelection rates. In Africa, for example, Maltz found that successor candidates (candidates from the same party as an outgoing president) have a 52% chance of

40. See Kermit Daniel & John R. Lott, Jr., *Term Limits and Electoral Competitiveness: Evidence from California's State Legislative Races*, 90 PUB. CHOICE 165, 181 tbl.7 (1997).

41. Maltz, *supra* note 1, at 133–34.

42. See Joel Lieske, *The Political Dynamics of Urban Voting Behavior*, 33 AM. J. POL. SCI. 150, 168 (1989).

43. Maltz, *supra* note 1, at 131–32.

44. *Id.* at 131.

45. *Id.*

46. *See id.*

47. *See id.* at 132.

a successful election, compared to a 93% reelection rate for incumbents.⁴⁸ In competitive democracies, the figure is 50%, compared to 64% for incumbents.⁴⁹

The mere alternation in individual presidential rule can help protect democracy, even where the alternation occurs within an existing party. Libertarian arguments for term limits, for example, focus on the capacity of term limits to weaken the power of the legislative or executive branch, and thus, promote commitments to limited government and individual liberty.⁵⁰ These arguments overlap with democratic arguments for term limits, or at least executive term limits.

A common hallmark of authoritarian government is an extremely strong executive branch that has a tradition of personalist presidential rule. Guarding against the danger of authoritarianism, therefore, will generally require limiting the powers of the executive branch, especially if there are individual executive leaders.⁵¹ Term limits are an obvious way to do this because they force a dominant president to leave office in ways that reduce the informal power of the presidency. Term limits also undermine the network of clientelist and patronage relationships that help sustain electoral authoritarian systems.⁵² The spread of presidential term limits in both Africa and Latin America in recent decades reflects this logic.⁵³ As John Carey notes, these prohibitions have been “motivated both by theory and by experiences of individual politicians who endeavored to entrench themselves in power.”⁵⁴

B. OBJECTIONS AND DISADVANTAGES

Critics of term limits, on the other hand, suggest that they tend to undermine democracy because they deprive institutions of the professional expertise and experience needed for success, undermine the incentives and accountability of elected officials, and deny voters the opportunity to re-elect their preferred representative.⁵⁵ These arguments also have a long lineage—

48. *Id.* at 134.

49. Cheeseman, *supra* note 26, at 142.

50. See Cain & Levin, *supra* note 17, at 171; Kurfist, *supra* note 19, at 126–27.

51. See Baker, *supra* note 8, at 288–89; Maltz, *supra* note 1, at 130.

52. See Baker, *supra* note 8, at 288–89, 297–98; Cheeseman, *supra* note 26, at 150–51; Maltz, *supra* note 1, at 136–37; Milanovic et al., *supra* note 11.

53. See John M. Carey, *The Reelection Debate in Latin America*, 45 *LATIN AM. POL. & SOC’Y* 119, 122, 127 (2003); see also Ginsburg et al., *supra* note 1; Maltz, *supra* note 1, at 131; Denis M. Tull & Claudia Simons, *The Institutionalization of Power Revisited: Presidential Term Limits in Africa*, 52 *AFR. SPECTRUM* 79, 82 (2017).

54. Carey, *supra* note 53, at 122. Simon Bolivar made an earlier argument for term limits in Latin America on this basis. See Ginsburg et al., *supra* note 1, at 1819–20. Note, however, that Bolivar ultimately reversed his position. See Carey, *supra* note 53, at 121–22; Ginsburg et al., *supra* note 1, at 1819.

55. See Cain & Levin, *supra* note 17, at 182–84; Ginsburg et al., *supra* note 1, at 1824; Mark P. Petracca, *Why Political Scientists Oppose Term Limits* (Feb. 18, 1992) (unpublished briefing paper) (on file with the Cato Institute) (addressing professionalism).

many of them were made by Alexander Hamilton in *Federalist* 72.⁵⁶ Some scholarship credit Hamilton's arguments for defeating proposals to include presidential term limits in the original U.S. Constitution.⁵⁷

Concerns about expertise and electoral incentives, discussed in Part V, can be addressed by appropriately generous and flexible forms of term limits. The concern about democracy seems to overlook two key arguments. First, term limits can play a role in preventing a slide toward authoritarianism or democratic regression. Second, there are democratic procedural arguments in favor of such limits (for example, the strong degree of popular support for the enactment of term limits, and the fact that many term limit provisions are introduced by way of an amendment proposed or ratified by voters at referenda).

In Africa, for example, public opinion polling by Afrobarometer between 2011 and 2013 found that 75% of voters across thirty-four countries favored a two-term limit for presidents.⁵⁸ Ed Glaeser suggests that this is consistent with risk aversion among democratic voters due to a preference for "cycling of ideologies rather than locking into a single ideology," or a preference for a degree of ongoing political or ideological alternation.⁵⁹

Some scholars further suggest that, at least under certain conditions, term limits may help promote democratic choice. Term limits solve a coordination problem among voters in different parties who wish to see, in addition to a norm of alternation in office, candidates from their own party succeed in elections.⁶⁰

We do not suggest that democratic concerns necessarily favor term limits in all contexts and for all institutions. The strength of the executive in fragile democracies, for example, is itself often the product of a history of weak legislatures incapable of imposing any meaningful checks on the executive branch. A key means of checking the potential for abuse by the legislature will thus be to increase the power and independence of the legislature. A stronger legislature will often impose term limits on the executive.⁶¹ Term limits, as Robert Kurfirst notes, have an important impact not only on the absolute power of institutions, but also on their relative power and standing.⁶²

56. See THE FEDERALIST NO. 72 (Alexander Hamilton) (Yale Univ. Press ed., 2009).

57. See Carey, *supra* note 53, at 120–21.

58. See BONIFACE DULANI, AFRICAN PUBLICS STRONGLY SUPPORT TERM LIMITS, RESIST LEADERS' EFFORTS TO EXTEND THEIR TENURE 3 fig.1 (2015); see also Adrienne LeBas, *Term Limits and Beyond: Africa's Democratic Hurdles*, 115 CURRENT HIST. 169, 170 (2016) (explaining that Africa is paying heightened attention to the idea of presidential term limits).

59. See Edward L. Glaeser, *Self-Imposed Term Limits*, 93 PUB. CHOICE 389, 390 (1997).

60. See, e.g., Andrew R. Dick & John R. Lott, Jr., *Reconciling Voters' Behavior with Legislative Term Limits*, 50 J. PUB. ECON. 1, 8 (1993); Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 85–86 (1997); Glaeser, *supra* note 59, at 389–90.

61. Some economists likewise suggest that it is important to weaken personal rule so as to promote the rule of law—this encourages private actors to invest in general rule of law protections, rather than in developing "clientilistic" relationships with individual political leaders. See Milanovic et al., *supra* note 11, at 3–4.

62. See Kurfirst, *supra* note 19, at 129–34. For the argument that term limits on executive and legislative officials may in fact be symbiotic or complementary in this context, see Michael J. Malbin & Gerald Benjamin,

Thus, we focus here on presidential term limits. Some countries may choose to adopt legislative term limits as an additional tool for promoting good government. However, the case for legislative term limits is more contingent, especially in cases where they weaken the power of the legislature and, thus, create an imbalance in the separation of powers.⁶³

II. MODELS OF PRESIDENTIAL TERM LIMITS

In constitutional design, arguments in favor of presidential term limits have won the day in the modern period. However, historically, this tradeoff was not always resolved in favor of presidential term limits, and term limits have not always been a standard part of constitutional design. Many early national constitutions, such as the United States Constitution of 1787 and the French Constitution of 1791, did not include them.⁶⁴ The U.S. Constitution instead adopted an informal two-term limit, which lasted until President Franklin Delano Roosevelt ran for, and won, four consecutive terms in the 1930s and 1940s.⁶⁵ Following his death, the United States formalized a presidential two-term limit in the 22nd Amendment, which was adopted in 1951.⁶⁶

In recent times, the adoption of presidential term limits has become the overwhelming design choice in presidential and semi-presidential systems.⁶⁷ Public opinion data shows that presidential term limits are generally very popular.⁶⁸ Even where individual presidents are popular, voters do not want them to remain in office forever. In contrast, term limits for other kinds of actors are less common. For example, a much smaller number of countries have term limits for members of the legislature.⁶⁹ Similarly, term limits for subnational officials, such as governors, appear to be less common than for presidents.⁷⁰ Table 1, based on our own calculations, presents term limits in all presidential and semi-presidential systems as of 2019. The most immediate point is that most systems have presidential term limits—only 16% lack them. Moreover, the characteristics of these countries support an argument that the absence of presidential term limits tends to erode constitutional democracy. Most of these countries, such as Azerbaijan, Belarus, Kazakhstan, Cameroon, Nicaragua, and

Legislatures After Term Limits, in *LIMITING LEGISLATIVE TERMS* 209, 220 (Gerald Benjamin & Michael J. Malbin eds., 1992).

63. In this sense, we take the opposite approach to much of the literature, which tends to be more heavily focused on legislative as opposed to executive term limits. See López, *supra* note 11, at 2.

64. As noted above, Hamilton, in the Federalist Papers, argued against them. See *THE FEDERALIST* NO. 72, *supra* note 56.

65. See Peter Feuerherd, *How FDR's Presidency Inspired Term Limits*, *DAILY JSTOR* (Apr. 12, 2018), <https://daily.jstor.org/how-fdrs-presidency-inspired-term-limits/>.

66. *Id.*

67. See ALEXANDER BATURO, *DEMOCRACY, DICTATORSHIP, AND TERM LIMITS* 32 (2014).

68. See Dulani, *supra* note 58.

69. See VENICE COMMISSION, *REPORT ON TERM LIMITS* (2019) [hereinafter *REPORT ON TERM LIMITS*] (exemplifying the ongoing debate about whether the legislature should be subject to term limits).

70. See *id.*

Venezuela, are ones that observers have argued are hybrid or pure authoritarian regimes.⁷¹

Table 1: Presidential Term Limits in Presidential and Semi-Presidential Systems, 2019

Type of Term Limit	Percent of Countries
No reelection allowed	8%
Bar on consecutive term after one term	8%
Bar on consecutive term after two terms	7%
Absolute bar after two terms	57%
Ambiguous whether absolute or consecutive bar after two terms	4%
No term limit	16%

*NOTE: SOURCE: AUTHORS' CALCULATIONS FROM CONSTITUTIONAL TEXTS.

Initially, constitutions that now lack term limits often included them.⁷² But in order to remain in power, incumbents used constitutional amendments, through the use of referenda, or other devices such as judicial decisions, to remove the term limits.⁷³ The argument in favor of the removal of term limits generally stressed the importance of continuity in exceptional circumstances.⁷⁴ For example, in Venezuela, a 1999 Constituent Assembly dominated by President Chavez stretched the presidential term limit from one term to two terms.⁷⁵ Later, during Chavez's second full term, he called for two referenda, one in 2007 and another in 2009, to remove presidential term limits.⁷⁶ The first effort narrowly failed, but the second succeeded.⁷⁷ The argument from Chavez and his allies was essentially that reelection was a regrettable necessity to keep

71. See Nicolas Cherry, *The Abolition of Presidential Term Limits in Nicaragua: The Rise of Nicaragua's Next Dictator?*, 2 CORNELL INT'L L.J. ONLINE 31 (2014) (discussing Nicaragua); Maltz, *supra* note 1, at 130, 128, 135 (discussing Azerbaijan, Belarus, Kazakhstan and Venezuela); Cheryl Hendricks & Gabriel Ngah Kiven, *Cameroon Presidential Poll Underscores the Need for Term Limits*, CONVERSATION (Oct. 8, 2018, 11:19 AM), <https://theconversation.com/cameroon-presidential-poll-underscores-the-need-for-term-limits-104583> (discussing Cameroon).

72. See Ginsburg et al., *supra* note 1, 1835–36; Cheryl Hendricks & Gabriel Ngah Kiven, *Presidential Term Limits: Slippery Slope Back to Authoritarianism in Africa*, CONVERSATION (May 17, 2018, 8:44 AM), <https://theconversation.com/presidential-term-limits-slippery-slope-back-to-authoritarianism-in-africa-96796>; Boniface Madalitso Dulani, *Personal Rule and Presidential Term Limits in Africa* (2011) (unpublished Ph.D dissertation, Michigan State University) (on file with Michigan State University Library).

73. See, e.g., REPORT ON TERM LIMITS, *supra* note 69, at 14 (prohibiting use of referenda to override a constitutional amendment to instate term limits, if adopted); Ginsburg et al., *supra* note 1, at 1810, 1812, 1847–48.

74. See, e.g., Ginsburg et al., *supra* note 1, 1823–27.

75. See *Venezuela's Chavez Era 1958–2013*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/timeline/venezuelas-chavez-era> (last visited Jan. 24, 2020).

76. *Id.*

77. *Id.*

his project on track, and the sweeping transformations that his regime was carrying out could not be entrusted to anyone else.⁷⁸

Some countries, about 8% of presidential and semi-presidential systems, take the strictest possible stance towards presidential term limits and prohibit *any* presidential reelection once an incumbent has served a single term in office.⁷⁹ The position taken by these countries obviously stresses the risks of reelection to democracy, even at the cost of foregoing the expertise and incentives that reelection may promote.

Of course, the effect of a strict one-term limit will also depend on other formal and informal aspects of the constitution. The most obvious interaction here is the length of presidential terms. Globally, presidential terms appear to vary between four and seven years, and term lengths closer to the latter end of the spectrum will give presidents more space to pursue their agendas than the former.

In Mexico, for example, presidents can serve only one six-year term in their lives.⁸⁰ The principle of no reelection is a defining principle of Mexican politics, even during its lengthy one-party dictatorship throughout most of the 20th century.⁸¹ In some ways, a lengthy term counterbalances the lack of reelection. As a result, Mexico has had a series of highly consequential administrations during the dictatorship, and during and after its transition to democracy.⁸²

Colombia, in contrast, historically allowed only one four-year term in a president's lifetime.⁸³ In 2005, President Alvaro Uribe amended the constitution to allow two consecutive terms and won reelection to a second term.⁸⁴ However, his subsequent attempt to amend the constitution again to allow three straight terms was blocked by the courts.⁸⁵ As a result, both Uribe and his successor, Juan Manuel Santos, were highly consequential presidents who served two terms each.⁸⁶ The former pursued a strategy of "democratic security" to repress the

78. See David Landau, *Constitution-Making and Authoritarianism in Venezuela: The First Time as Tragedy, the Second as Farce*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 161–63 (Mark A. Graber et al. eds., 2018).

79. See *supra* Table 1.

80. Constitución Política de los Estados Unidos Mexicanos, CP, Arts. 82–83, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 09-08-2019 (Mex.).

81. See Jeffrey Weldon, *The Political Sources of Presidentialism in Mexico*, in PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA 225 (Scott Mainwaring & Matthew Soberg Shugart eds., 1997).

82. See EMILY EDMONDS-POLI & DAVID A. SHIRK, CONTEMPORARY MEXICAN POLITICS 49–96 (3d ed. 2016).

83. See Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606, 615 (2015).

84. See *id.* at 615–16.

85. *Id.* at 616.

86. See, e.g., Alia M. Matanock & Miguel García-Sánchez, *The Colombian Paradox: Peace Processes, Elite Divisions and Popular Plebiscites*, DAEDALUS J. AM. ACAD. ARTS & SCI. 152 (2017); Jeremy McDermott, *How President Alvaro Uribe Changed Colombia*, BBC NEWS (Aug. 4, 2010), <https://www.bbc.com/news/world-latin-america-10841425>; Maria Alejandra Silva, *Alvaro Uribe: The Most Dangerous Man in Colombian Politics*, COUNCIL ON HEMISPHERIC AFF. (Oct. 20, 2017),

FARC guerilla movement, and the latter sought a peace agreement that took many years to pursue.⁸⁷ Santos, however, re-imposed a one-term, four-year limit during his second term in office, and it remains to be seen how this will impact the strength of future administrations.⁸⁸

Most presidential and semi-presidential systems around the world take an intermediate position, balancing the benefits and costs of presidential term limits. The most common design, implemented by over half of all presidential and semi-presidential systems, prohibits any reelection after two consecutive terms in office.⁸⁹ This *absolute* bar on reelection after two terms appears to be aimed at balancing different aspects of the tradeoff. An absolute two-term limit allows voters to reward good performance and punish bad performance. Moreover, successful programs can continue for eight or more years, depending on the length of presidential term, giving presidents considerable time to develop their policies. Nonetheless, the term limit forces turnover in office and prevents incumbent presidents from amassing too much power.

An alternative design choice, one we argue for in this Article, bars *consecutive* reelection.⁹⁰ A system that bars consecutive reelection allows presidents to serve one or two terms in office consecutively, but then require that they sit out for one or more terms before running for election again.⁹¹ Chile, for example, bars consecutive reelection from presidents after serving one four-year term, but allows them to return to power after sitting out one term.⁹² Former president Michele Bachelet, for example, served between 2006 and 2010, and again from 2014 until 2018.⁹³

<http://www.coha.org/alvaro-uribe-the-most-dangerous-man-in-colombian-politics/>; Lally Weymouth, *An Interview with Colombian President Juan Manuel Santos*, WASH. POST (Aug. 7, 2014), https://www.washingtonpost.com/opinions/an-interview-with-colombian-president-juan-manuel-santos/2014/08/07/3eaff428-1ced-11e4-82f9-2cd6fa8da5c4_story.html.

87. See Matanock & García-Sánchez, *supra* note 86, at 155; McDermott, *supra* note 86.

88. See Elizabeth Reyes L., *Colombian Lawmakers Approve a One-Term Limit for Presidents*, EL PAÍS (June 4, 2015, 3:59 PM), https://elpais.com/elpais/2015/06/04/inenglish/1433416990_898964.html.

89. See *supra* Table 1.

90. Ginsburg, Melton, and Elkins find that the most common design of all presidential term limits historically (as opposed to just those in force today) allowed consecutive reelection after one term in office—27% of all constitutions used this model, according to their data. See Ginsburg et al., *supra* note 1, at 1836.

91. As noted in Table 1, there is a small group of countries where it is clear from the constitutional text that presidents can serve only two consecutive terms in office, but it is unclear whether they are only temporarily or permanently barred after serving two terms. Taiwan, for example, recently had some controversy about whether ex two-term President Ma Ying-Jeou could seek a third term after sitting out one term. See Brian Hioe, *Claims by SCMP that Ma Can Run for a Third Presidential Term Are Ludicrous*, NEW BLOOM (May 10, 2018), <https://newbloommag.net/2018/05/10/scmp-ma-third-term/>. In Malawi, the Supreme Court, in 2009, held that an ambiguous term limit should be interpreted to bar a potential nonconsecutive third term by former President Bakili Muluzi. See *Muluzi Denied Slot in Malawi Election*, UPI (May 16, 2009, 12:50 PM), https://www.upi.com/Top_News/2009/05/16/Muluzi-denied-slot-in-Malawi-election/88971242492659/?ur3=1.

92. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 25.

93. See Ernesto Londoño, *President Bachelet of Chile Is the Last Woman Standing in the Americas*, N.Y. TIMES (July 24, 2017), <https://www.nytimes.com/2017/07/24/world/americas/michelle-bachelet-president-of-chile.html>.

Until this year, the island country of Comoros allowed presidents to serve unlimited, non-consecutive five-year terms.⁹⁴ Current President Azali Assoumani previously served as president between 1999 and 2002, as well as between 2002 and 2006.⁹⁵ Brazil requires that presidents sit out for at least one term after serving two consecutive terms in office.⁹⁶ President Luiz Inacio Lula da Silva (Lula), for example, served as president for two terms between 2003 and 2010, and was planning to run again for a second term in 2019, before being jailed on corruption charges.⁹⁷

The bar against consecutive reelection balances the tradeoff involved in presidential term limits in a somewhat different way than an absolute bar. Forcing presidents to leave power may help to break excessive consolidation of power—even if presidents are able to return later—but still gives presidents incentives towards electoral accountability, since they may seek a new term in the future. A bar against consecutive reelection also gives presidents more than one term to pursue their projects, especially when they are allowed to pursue two consecutive terms before leaving power.

As we emphasize in Part V, a design that stresses consecutive, instead of absolute, bans on reelection may reduce the inclination of incumbents to evade term limits by lessening the costs of compliance, thus reducing what we call the “end game” problem.

Notably, only one system with any presidential term limits appears to allow more than two consecutive terms in office. In the Republic of the Congo, a 2015 referendum amended the constitution to allow three consecutive four-year terms in office.⁹⁸ The apparent lack of countries that follow a similar system reflects a fairly broad consensus, at least at the level of constitutional design, that allowing more than two consecutive terms in office poses threats to constitutional democracy that outweigh any gains in electoral accountability and continuity in policy. Despite this consensus, a number of presidents have managed to use devices, such as temporary constitutional provisions or judicial interpretation, to circumvent their term limits and remain in power.⁹⁹

94. CONSTITUTION DE L'UNION DES COMOROS [CONSTITUTION] Mar. 24, 2001, art. 13. The new system allows two consecutive terms. See *Comoros Islanders Vote in Presidential Election*, BBC NEWS (Mar. 24, 2019), https://www.bbc.com/news/world-africa-47685991?intlink_from_url=https://www.bbc.com/news/topics/cx1m7zg0gnlt/comoros&link_location=live-reporting-story.

95. See *Former Coup Leader Wins Presidential Race in Comoros*, VOA NEWS (Apr. 15, 2016, 8:43 PM), <https://www.voanews.com/africa/former-coup-leader-wins-presidential-race-comoros>.

96. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] Dec. 2017, art. 14 (Braz.).

97. See Dom Phillips, *Brazil's Lula Launches Presidential Bid from Jail as Thousands March in Support*, GUARDIAN (Aug. 15, 2018, 6:48 PM), <https://www.theguardian.com/world/2018/aug/15/brazil-lula-presidential-election-campaign-jail>.

98. See Philon Bondenga, *Congo Votes by Landslide to Allow Third Presidential Term*, REUTERS (Oct. 27, 2015, 12:13 AM), <https://www.reuters.com/article/us-congo-politics/congo-votes-by-landslide-to-allow-third-presidential-term-idUSKCN0SL0JW20151027>.

99. A very small number of systems combine the logic of consecutive and absolute prohibitions on reelection. These systems generally require presidents to sit out after serving one term in office, but also limit

In summary, while the vast majority of presidential and semi-presidential systems have some kind of term limit to prevent the erosion of democracy, almost all systems allow presidents to serve more than one term. This reflects the value that constitutional designers place significant value on other goals, such as accountability, efficiency, and continuity in public policy.

III. THE PROBLEM OF COMPLIANCE

There is a strong positive correlation worldwide between the increasing constitutional entrenchment of presidential term limits and the tendency of presidents to leave office “voluntarily” as part of a peaceful democratic transition, rather than through a military coup.

In Africa especially, Daniel Posner and Daniel Young note that many countries introduced new, entrenched constitutional term limits from the 1990s onward: thirty-two out of thirty-eight constitutions between 1990 and 2005 adopted or entrenched such limits.¹⁰⁰ During this period, there was a marked increase in the number of leaders who left “voluntarily,” rather than through coups, assassination, or other involuntary means. Between 2000 and 2005, only 19% of leaders left power *involuntarily*, whereas 70–75% did so in the 1960s, 1970s, and 1980s.¹⁰¹ Of those seventeen leaders that left office “voluntarily” between 2000 and 2005, nine also departed when they reached the end of their presidential term limits.¹⁰²

The overall pattern globally, however, is not quite so positive. Rather, it involves a significant amount of non-compliance with presidential term limits.¹⁰³ Tom Ginsburg, James Melton, and Zachary Elkins note that, of the 352 cases in their dataset where presidents had the opportunity to over-stay (in other words, did not depart early from office), 89 involved an attempt by presidents to stay beyond their constitutionally permitted term, and 71 of those attempts were successful.¹⁰⁴ Of these 71 cases, 56 involved formal constitutional amendment or replacement, 29 and 27 respectively, five involved the suspension of the constitution, and 10 involved the circumvention or disregard of constitutional

the total number of terms they can serve in their lives. For example, Haiti limits presidents to serving one consecutive five-year term; they can return to power after sitting out one term, but are limited to serving only two terms in their lives. LA CONSTITUTION DE LA RÉPUBLIQUE D’HAÏTI [CONSTITUTION] 1987, art. 134–3 (“The President of the Republic may not be re-elected. He may serve an additional term only after an interval of five (5) years. He may in no case run for a third term.”).

100. See Daniel N. Posner & Daniel J. Young, *The Institutionalization of Political Power in Africa*, 18 J. DEMOCRACY 126, 132 fig. 3 (2007).

101. See *id.* at 128 fig.1, 128–29.

102. *Id.* at 129.

103. For skepticism about compliance, see Daron Acemoglu et al., *A Political Theory of Populism*, 18 Q.J. ECONOMICS 771, 792 (2013); Baker, *supra* note 8, at 285; Javier Corrales & Michael Penfold, *Manipulating Term Limits in Latin America*, 25 J. DEMOCRACY 157, 158 (2014); Ginsburg et al., *supra* note 1, 1847–50; Maltz, *supra* note 1, at 129–30; Smith et al., *supra* note 21, at 6–7.

104. Ginsburg et al., *supra* note 1, at 1848–49.

limitations.¹⁰⁵ Moreover, 15 of these “constitutional oversteering” attempts occurred in countries that were constitutional democracies at the time.¹⁰⁶ Some of these occurred in the 19th and early 20th centuries: Costa Rica in 1876,¹⁰⁷ as well as in 1898;¹⁰⁸ Colombia in 1886;¹⁰⁹ Uruguay in 1935;¹¹⁰ and Honduras in 1936.¹¹¹ Others were more recent, including the Philippines in 1973, Peru in 1995, Argentina in 1995, Brazil in 1998, Venezuela in 2004, Colombia in 2006, Niger in 2009, and Belarus in 2006.¹¹²

Gideon Maltz likewise notes twenty-six instances in which presidents chose not to comply with relevant term limits between 1992 and 2006: fourteen of these instances involved the amendment or repeal of relevant limits, while twelve involved some form of constitutional “over-staying” or breach of the relevant limit.¹¹³ Six of these countries were constitutional democracies at the time of the relevant constitutional non-compliance.¹¹⁴

In Africa, Posner and Young note the amendment or repeal of constitutional term limits between 1990 and 2005 in Chad, Gabon, Guinea, Namibia, Togo and Uganda.¹¹⁵ The incumbent president in each case ultimately won the relevant election, such that these changes led to a third consecutive presidential term for Presidents Idriss Déby of Chad, Omar Bongo of Gabon, Lansana Conté of Guinea, Samuel Nujoma of Namibia, Gnassingbé Eyadéma of Togo, and Yoweri Museveni of Uganda.¹¹⁶

Denis Tull and Claudia Simons extended this analysis to 2016 and found that, of the thirty-nine presidents in Africa who reached the end of their constitutionally permitted time in office, eighteen chose not to comply with relevant term limits, but instead chose to circumvent or to formally amend those limits.¹¹⁷ Attempts at formal constitutional change were met with an extremely

105. *Id.* at 1849.

106. *Id.*

107. Tomas Guardia Gutierrez, where there was a single term limit with non-immediate reelection not permitted. Ginsburg et al., *supra* note 1, at 1851–52.

108. Rafael Yglesias Castro, where there was a single term limit, with non-immediate reelection not permitted. *Id.* at 1852.

109. Rafael Nunez, where there was a single term limit, with non-immediate reelection permitted after a full two-year term elapsed. *Id.* at 1850 n.213.

110. Gabriel Terra, where there was a single term limit, with non-immediate reelection permitted: two terms must elapse before the executive can be re-elected. *See id.* at 1869 tbl.A1.

111. Carias Andino, where there was a single term limit, with non-immediate reelection permitted. *See id.*

112. *See id.* at 1869–72.

113. Maltz, *supra* note 1, at 128.

114. *See id.* at 130 fig.1 (listing Argentina, Brazil, the Dominican Republic, Namibia, Romania and Venezuela).

115. *See* Posner & Young, *supra* note 100, at 132–34. In Guinea, the relevant amendment also repealed all term limits, thereby allowing President Lansana Conté the possibility of indefinite reelection. *See* Baker, *supra* note 8, at 291–92.

116. Posner & Young, *supra* note 100, at 133–34. On how changes in Guinea and Burkina Faso have led to the scope for indefinite reelection in those countries, see Baker, *supra* note 8, at 291–92.

117. *See* Tull & Simons, *supra* note 53, at 83–85.

high rate of success. For instance, out of the eighteen presidential attempts to formally amend term limits, fifteen succeeded, compared to only three cases of failure.¹¹⁸

Perhaps the most comprehensive study of term limits evasion to date has been carried out by Mila Versteeg and several coauthors, in which they studied 106 countries.¹¹⁹ Since 2000, of 234 constitutionally-required presidential exits from office, there were 60 cases of attempted evasion of existing term limits.¹²⁰ Thus, like Ginsburg and Elkins, they find that attempted term limits evasion occurs about 25% of the time.¹²¹

By far the most common tool to evade term limits is formal amendment to the constitution, which removes or loosens the term limit.¹²² But this is not the only tool that incumbent presidents wishing to stay in power possess. The study also outlines other techniques that are used fairly commonly. One is to replace the entire constitution, which often has the effect of resetting the clock on term limits.¹²³ Another is to go to the judiciary and to convince it to reinterpret the term limit or to throw it out entirely.¹²⁴ These latter techniques may actually be more damaging to the rule of law than constitutional amendment, since they may have collateral costs to stability or to judicial independence.

Consider the problem through a number of recent cases, drawn first from Africa. In 2008, the parliament of Cameroon voted to amend its constitution to remove all presidential term limits, thereby allowing President Paul Biya to extend his term beyond the twenty-five years he had already served.¹²⁵ Similarly, in 2012 in Senegal, supporters of President Abdoulaye Wade successfully proposed amending the constitution to allow him to run for a third term, despite significant public protests.¹²⁶ The only silver lining from a democratic perspective was that the amendment process galvanized a new grass-roots political opposition movement that defeated Wade's actual bid for reelection.¹²⁷

In 2010, the Djibouti parliament voted to remove presidential term limits from its constitution, to shorten the presidential term to five years, and to impose

118. *See id.* at 85.

119. Versteeg et al., *supra* note 4.

120. *See id.*

121. *See supra* text accompanying note 90.

122. *See* Versteeg et al., *supra* note 4.

123. *See id.*

124. *See id.*

125. LeBas, *supra* note 58, at 171; *Cameroon Parliament Extends Biya's Term Limit*, FR.24, <http://www.france24.com/en/20080411-cameroon-parliament-paul-biya-term-limit-extension> (last updated Nov. 4, 2008, 4:06 PM); Will Ross, *Cameroon Makes Way for a King*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/7341358.stm> (last updated Apr. 11, 2008, 7:08 AM).

126. *See* Lamin Jahateh, *Controversy of Abdoulaye Wade's Presidential Bid*, AL JAZEERA (Jan. 28, 2012), <https://www.aljazeera.com/indepth/opinion/2012/01/201212712295177724.html>.

127. *See* LeBas, *supra* note 58, at 171.

a mandatory retirement age of seventy-five for the president.¹²⁸ These amendments paved the way for President Ismael Omar Guelleh to stand for reelection for a third term in 2011 and a fourth term in 2016.¹²⁹ Guelleh was ultimately re-elected in 2016 with 87% of the vote, against a backdrop of significant alleged political repression and electoral irregularities.¹³⁰

In 2015, the Rwandan parliament passed a constitutional amendment, which was then approved at a national referendum, to reduce presidential term limits from seven to five years.¹³¹ In addition, the Rwandan parliament also created a set of “transitional” arrangements that allowed the winner of the 2017 presidential election to serve an initial transitional seven-year term, and subsequently be eligible for two additional five-year terms.¹³² In aggregate, these changes created the possibility for President Paul Kagame to stay in office for a further seventeen years, until 2034.¹³³

In the lead up to the 2020 Burundi presidential elections, President Nkurunziza, who had already served for three terms, proposed changes to the Burundi constitution to allow him to seek reelection for two more consecutive terms.¹³⁴ Following his reelection to a third term in 2015, he appointed a commission to consider the possibility of further constitutional amendments.¹³⁵ After a process of public consultation, the commission announced its recommendation to extend presidential term limits from five to seven years.¹³⁶ The commission also recommended various parallel changes to the power of the presidency.¹³⁷ Despite criticisms of the commission, and its processes, the

128. See *MPs in Djibouti Scrap Term Limits*, BBC News, <http://news.bbc.co.uk/2/hi/africa/8630616.stm> (last updated Apr. 19, 2010, 5:57 PM).

129. See *Djibouti President Ismail Omar Guelleh Wins Fourth Term*, BBC NEWS (Apr. 9, 2016), <http://www.bbc.com/news/world-africa-35995628>.

130. *Id.*

131. See *Rwanda Changes Constitution to Allow President to Extend His Rule Until 2034*, ABC NEWS, <http://www.abc.net.au/news/2015-12-20/rwanda-changes-constitution-to-allow-president-to-stay-in-power/7043698> (last updated Dec. 19, 2015, 5:18 PM); *Rwandans Vote on Allowing Third Kagame Presidential Term*, BBC NEWS (Dec. 18, 2015), <http://www.bbc.com/news/world-africa-35125690>.

132. See *Rwanda Changes Constitution to Allow President to Extend His Rule Until 2034*, *supra* note 131; *Rwandans Vote on Allowing Third Kagame Presidential Term*, *supra* note 131.

133. *Rwanda Changes Constitution to Allow President to Extend His Rule Until 2034*, *supra* note 131; Claudine Vidal, *Rwanda: Paul Kagame Is in Line to Stay in Office Until 2034*, CONVERSATION (Jan. 18, 2016, 7:17 AM), <https://theconversation.com/rwanda-paul-kagame-is-in-line-to-stay-in-office-until-2034-53257>.

134. See *Will the 2020 Elections in Burundi Be Bloody?*, AFR. NEWS (July 29, 2019, 10:03 AM), <https://www.africanews.com/2019/07/29/will-the-2020-elections-in-burundi-be-bloody/>.

135. See Mohammed Yusuf, *Burundi Parliament to Review Plan on Scrapping Term Limits*, VOA NEWS (Aug. 29, 2016, 2:12 PM), <https://www.voanews.com/a/burundi-parliament-term-limits/3485090.html>.

136. *Burundi Backs New Constitution Extending Presidential Term Limits*, AL JAZEERA (May 22, 2018), <https://www.aljazeera.com/news/africa/2018/05/burundi-backs-constitution-extending-presidential-term-limits-180521134736408.html>.

137. Yolande Bouka & Sarah Jackson, *Burundi Votes Tomorrow on Controversial Constitutional Amendments. A Lot Is at Stake*, WASH. POST (May 16, 2018, 6:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/16/burundi-votes-tomorrow-on-controversial-constitutional-amendments-a-lot-is-at-stake/>.

proposed changes were subsequently approved by voters at a national referendum in 2018.¹³⁸

Another method used to circumvent presidential term limits in Africa is through the use of the judiciary. For example, in Burundi, President Pierre Nkurunziza's party, in 2015, asked the Constitutional Court of Burundi to find that the existing term limits did not apply to President Nkurunziza because he was elected under transitional provisions that provided for indirect, parliamentary election rather than direct elections.¹³⁹ The court upheld the argument, finding that the transitional provisions operated separately from the provisions imposing presidential term limits.¹⁴⁰ The court's decision ultimately paved the way for President Nkurunziza to be re-elected for a third term.¹⁴¹

A similar pattern of evasion applies in Latin America.¹⁴² Between 1993 and 2009, Argentina, Brazil, and Colombia all passed formal constitutional changes that relaxed constitutional term limits and allowed some scope for presidential reelection.¹⁴³ Ecuador and Venezuela formally repealed term limits altogether so presidents could seek indefinite reelection.¹⁴⁴ In both countries, the changes were passed despite a tiered constitutional design that required a more demanding standard when attempting to alter the fundamental structure of the constitution.¹⁴⁵ In Ecuador, for example, changes to the "fundamental structure, or the nature and constituent elements of the State" require a referendum, whereas most other changes can be carried out by Parliament alone.¹⁴⁶ Despite compelling arguments that the elimination of all term limits would be the type of fundamental change that would require a more demanding procedure,¹⁴⁷

138. See *id.* (noting criticisms of the process, and its selectivity, by the Burundi Forum for Strengthening Civil Society). The referendum itself was also critiqued as tainted by voter intimidation and a lack of transparency. See Abdi Latif Dahir, *Burundi Has Backed Constitutional Changes that Could See Its President Rule till 2034*, QUARTZ AFR. (May 21, 2018), <https://qz.com/1284514/burundi-backs-new-constitution-extending-president-term-limit/>.

139. See Stef Vandeginste, *Legal Loopholes and the Politics of Executive Term Limits: Insights from Burundi*, 51 AFR. SPECTRUM, 39, 45 (2016).

140. *Id.* at 52.

141. Clement Manirabarusha, *Burundi President's Commission Says People Want Term Limits Removed*, REUTERS (Aug. 25, 2016, 1:26 AM), <https://www.reuters.com/article/us-burundi-politics/burundi-presidents-commission-says-people-want-term-limits-removed-idUSKCN110001>.

142. For an overview of judicial decisions in this area, see David Landau et al., *Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America*, in THE POLITICS OF PRESIDENTIAL TERM LIMITS 53 (Alexander Baturo & Robert Elgie eds., 2019).

143. See Corrales & Penfold, *supra* note 31, at 160.

144. See *id.*

145. See Dixon & Landau, *supra* note 10, at 448–49.

146. REFORMA DE LA CONSTITUCIÓN, 2008, art. 441 (Ecuador).

147. See, e.g., Carlos Bernal Pulido, *There Are Still Judges in Berlin: On the Proposal to Amend the Ecuadorian Constitution to Allow Indefinite Presidential Reelection*, INT'L J. CONST. L. BLOG (Sept. 10, 2014), <http://www.iconnectblog.com/2014/09/there-are-still-judges-in-berlin-on-the-proposal-to-amend-the-ecuadorian-constitution-to-allow-indefinite-presidential-reelection> (arguing that the abolition of term limits in Ecuador should require either a more demanding procedure or a constituent assembly).

presidents in both countries used the less demanding default standard, and the high courts allowed them to do so.¹⁴⁸

In another class of Latin American countries, courts played a more direct role and actively removed presidential term limits from their constitution by holding that the term limits themselves were unconstitutional. This route was generally taken in cases where presidents lacked the ability to make formal changes to the constitution that eradicated term limits. In 2009, for example, the Nicaraguan Supreme Court held that a constitutional term limit that would have prevented President Ortega from running for a third term in office was unconstitutional.¹⁴⁹ The court set the term limit aside, allowing Ortega to run for and subsequently win a new term.¹⁵⁰ Once Ortega had sufficient parliamentary support, his allies passed an amendment formally removing the term limit, and he has remained in power ever since.¹⁵¹

In 2015, the Honduran court used a similar maneuver to remove a supposedly unamendable term limit,¹⁵² allowing President Juan Orlando Hernandez to run for, and subsequently win, reelection.¹⁵³ Similarly, in Bolivia, after losing a referendum to extend presidential term limits that would allow Bolivian President Evo Morales to run for a fourth consecutive term,¹⁵⁴ Morales turned to the judiciary.¹⁵⁵ The Bolivian Constitutional Court obliged by holding that the constitutional term limit was unconstitutional,¹⁵⁶ which paved the way for Morales to run for reelection indefinitely.¹⁵⁷

There have been formal changes to term limits in other regions. For example, term limits have recently been relaxed or repealed in Belarus,

148. See Corte Constitucional del Ecuador [Constitutional Court of Ecuador] Oct. 31, 2014, Dictamen [Decision] 0001-14-DRC-CC; Republica Bolivariana de Venezuela Tribunal Supremo de Justicia Sala Constitucional [Supreme Tribunal of Justice, Bolivarian Republic of Venezuela] Dec. 11, 2008, Expediente [Case] 1610/08.

149. See Dante Figueroa, *Nicaragua Supreme Court Decision Permitting President, Others to Seek Reelection*, LIBR. CONG.: GLOBAL LEGAL MONITOR (Dec. 18, 2009) <https://www.loc.gov/law/foreign-news/article/nicaragua-supreme-court-decision-permitting-president-others-to-seek-reelection/>.

150. See *Nicaragua: Ortega Allowed to Run for Third Successive Term*, BBC NEWS (Jan. 29, 2014), <https://www.bbc.com/news/world-latin-america-25937292>.

151. See *id.*

152. See Corte Suprema de Justicia, Sala de lo Constitucional [Supreme Court of Justice, Constitutional Court] Apr. 22, 2015, <http://www.poderjudicial.gob.hn/Documents/FalloSCONS23042015.pdf>.

153. The term limit in Honduras, however, was part of the original 1982 Constitution, and not a later amendment, forcing the court to use something like an “unconstitutional constitution” doctrine. For discussion, see David Landau et al, *From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras*, 8 GLOBAL CONST. 40, 52–53 (2019).

154. See Daniel Ramos & Monica Machicao, *Bolivia’s Morales Accepts Defeat in Term Limit Referendum*, REUTERS (Feb. 23, 2016, 8:02 PM), <https://www.reuters.com/article/us-bolivia-referendum-idUSKCN0VX09E>.

155. See *Bolivia Court Allows President Morales to Run for Fourth Term*, AL JAZEERA (Dec. 5, 2018), <https://www.aljazeera.com/news/2018/12/bolivia-court-morales-run-fourth-term-181205052250163.html>.

156. See Tribunal Constitucional Plurinacional, Sentencia Constitucional [Plurinational Constitutional Court] Nov. 28, 2017, Expediente [Case] 20960-2017-42-AIA (BOL.).

157. In Bolivia, as in Honduras, the relevant term limit was part of the original 2009 Constitution, and not that later amendment. See Landau et al., *supra* note 142, at 69–70.

Kazakhstan, Tajikistan, and Uzbekistan.¹⁵⁸ In 2016, voters in Tajikistan voted to approve a referendum to exempt the sitting President, Emomali Rahmon, from all term limits under the 1994 Constitution, on the basis that he brought the country “peace” and unity.¹⁵⁹ The relevant changes were approved by the Constitutional Court of Tajikistan in 2016 and aligned with the 1999 amendments that lengthened the presidential term limit from five to seven years.¹⁶⁰

Presidential attempts to lengthen or remove term limits have a high success rate. Versteeg et al., for example, found forty successes out of the sixty attempts since 2000.¹⁶¹ This suggests that constitutional entrenchment of term limits has not been especially successful, a problem that we explore in more detail in the next Part. That said, there have been some prominent cases where presidents tried and failed to change or evade their term limits, and we survey those cases here.

In Africa, for example, between 1990 and 2016, attempts to evade term limits failed in Zambia in 2001, Malawi in 2002, Nigeria in 2006, Senegal in 2011, and Burkina Faso in 2014.¹⁶² In Zambia, President Frederick Chiluba tried but failed to amend the constitution to allow a run for a third term in office.¹⁶³ Chiluba’s attempts to extend his term faced widespread popular opposition, as well as opposition from within his own party.¹⁶⁴ Fifteen senior members of the ruling Movement for Multiparty Democracy (MMD) publicly opposed the amendment, and fifty-nine MMD legislators, including the Vice President, signed a document vowing to oppose the President gaining a third term.¹⁶⁵ Ultimately, Chiluba resigned.¹⁶⁶

In Malawi, President Bakili Mulizi failed to amend the constitution to allow a run for a third term because the amendment fell three votes short of

158. Ginsburg et al., *supra* note 1, at 1812–13; *see also* Christopher Walker, *East: The “Leader for Life” Governance Model*, RADIO FREE EUR./RADIO LIBERTY (Feb. 29, 2008, 12:15 PM), <https://www.rferl.org/a/1079557.html> (discussing changes in Belarus, Kazakhstan, Tajikistan and Uzbekistan).

159. Agence France-Presse, *Tajikistan Votes to Allow President to Rule Indefinitely*, GUARDIAN (May 23, 2016, 4:03 PM), <https://www.theguardian.com/world/2016/may/23/tajikistan-votes-to-allow-president-emomali-rahmon-to-rule-indefinitely>.

160. *See* Alexis Wheeler, *Tajikistan Court Approves Constitutional Amendments Removing Limit on Presidential Term*, JURIST (Feb. 5, 2016, 2:19 PM), <https://www.jurist.org/news/2016/02/tajikistan-no-limit-on-presidential-term>.

161. *See* Versteeg et al., *supra* note 4.

162. *See* Tull & Simons, *supra* note 53, at 84–87 (coding this as a case of voluntary departure).

163. *See* Mwangi S. Kimenyi & Nelipher Moyo, *The Late Zambian President Frederick Chiluba: A Legacy of Failed Democratic Transition*, BROOKINGS (June 24, 2011), <https://www.brookings.edu/opinions/the-late-zambian-president-fredrick-chiluba-a-legacy-of-failed-democratic-transition>.

164. *See* Henri E. Cauvin, *Zambia’s President Abandons Re-Election Bid*, N.Y. TIMES (May 5, 2001), <https://www.nytimes.com/2001/05/05/world/zambia-s-president-abandons-re-election-bid.html>.

165. *See* Posner & Young, *supra* note 100, at 133; *see also* Baker, *supra* note 8, at 293–94.

166. *See* Posner & Young, *supra* note 100, at 133; Tull & Simons, *supra* note 53, at 85; *see also* Baker, *supra* note 8, at 294 (describing the influence of donor pressure in this context especially).

achieving a two-thirds super-majority in the legislature needed for successful passage.¹⁶⁷

In Nigeria, President Olusegun Obasango's attempt to run for a third term was blocked by the Senate after a parliamentary minority voted against the proposal from Obasango's supporters to remove the existing two-presidential term limit from the Nigerian constitution.¹⁶⁸ This failed attempt occurred against the backdrop of two previous military coups in Nigeria (in 1963–66 and 1979–83), and thus represents a notable instance of successful democratic entrenchment.¹⁶⁹

In Senegal, President Wade was met with broad opposition when he proposed to amend the constitution in 2011 to allow a third term in office.¹⁷⁰ The civil society organization "M23" (named after protests held on May 23), or "Y'en a Marre," led to mass demonstrations against the proposed changes; ultimately, Wade withdrew the proposed changes from parliament.¹⁷¹ While he still chose to run for a third term in the 2011 presidential elections, despite contravening the constitution's two-term limit, he was defeated in the polls by the opposition candidate.¹⁷²

In Burkina Faso, plans by President Compaoré to amend the constitution to seek a third presidential term in 2014 were met with mass public protest. Inspired by their counterparts in Senegal, citizens in Burkina Faso formed a protest movement entitled "Le Balai Citoyen" (Citizen Broom) calling for Compaoré to leave office and the parliament to reject the proposed constitutional changes.¹⁷³ Their rallying cry was "Hands off my Constitution."¹⁷⁴ In the short-term, these protests triggered, or at least provided a pretext for, a major regression in commitments to constitutional democracy in the country.¹⁷⁵ They led Compaoré to dissolve the parliament and the military to announce a take-over of the government.¹⁷⁶ However, continued protests led the military to reinstate civilian rule and call for fresh democratic elections in 2015, in which the opposition candidate Roch Marc Christian Kaboré won a majority.¹⁷⁷

167. See Baker, *supra* note 8, at 294–95; Posner & Young, *supra* note 100, at 133.

168. See Posner & Young, *supra* note 100, at 126; Ross, *supra* note 125.

169. See Posner & Young, *supra* note 100, at 126.

170. See Janette Yarwood, *The Struggle over Term Limits in Africa: The Power of Protest*, 27 J. DEMOCRACY 51, 53–55 (2016).

171. See *id.* at 53–54.

172. See LeBas, *supra* note 58, at 171; Yarwood, *supra* note 170, at 54.

173. See Yarwood, *supra* note 170, at 52–53.

174. See *id.* at 55.

175. See *id.* at 54–55.

176. See *id.* at 55.

177. See Matthew Bonkougou & Nadoun Coulibaly, *Kaboré Wins Burkina Faso Presidential Election*, REUTERS (Nov. 30, 2015, 4:37 PM), <https://www.reuters.com/article/us-burkina-election-idUSKBN0TJ0QT20151201>; Roch Marc Christian Kaboré Elected Burkina Faso President, BBC NEWS (Dec. 1, 2015), <https://www.bbc.com/news/world-africa-34971505>.

In Latin America, there have also been several failed attempts to change term limits in recent years.¹⁷⁸ For example, in 2010, an attempt by President Alvaro Uribe was blocked by a decision of the Colombian Constitutional Court, which held that allowing a third consecutive term in office would be unconstitutional because it would clash with core constitutional principles, such as the separation of powers.¹⁷⁹ Versteeg et al. found that this was the only time since 2000 that a court successfully blocked an attempted change to presidential term limits.¹⁸⁰

In Panama in 1998 and Bolivia in 2016, attempts to change presidential term limits through referendum were defeated by voters.¹⁸¹ However in Bolivia, as noted above, Morales eventually succeeded by successfully petitioning the judiciary to remove the term limit.¹⁸² In 2009, a possible attempt by Manuel Zelaya of Honduras to change a one-term limit was blocked by the military, which ousted the incumbent in a coup.¹⁸³ Finally, in 2017, an attempt by Horacio Cartes of Paraguay to loosen presidential term limits via amendment failed in the House of Representatives in the face of massive popular protests.¹⁸⁴ The attempt at change via amendment was undertaken despite a constitutional text that appeared to lay out with clarity that changes to presidential term limits require a Constituent Assembly and cannot be undertaken using the normal amendment mechanism.¹⁸⁵ A number of civil society groups, with the support of the powerful Paraguayan Catholic Church, mobilized in opposition to the measure.¹⁸⁶ At one stage the Congress was even set on fire.¹⁸⁷

Thus, attempted changes or evasions of presidential term limits to benefit incumbents are quite common. While there have been cases where presidents have failed to achieve their goals of loosening or eliminating term limits, often in the face of popular mobilization, evasion attempts are usually successful.

178. See Corrales & Penfold, *supra* note 31, at 160; Frida Ghitis, *Bolivia's Term Limit Referendum a Warning to Latin American Autocrats*, WORLD POL. REV. (Feb. 25, 2016), <https://www.worldpoliticsreview.com/articles/18049/bolivia-s-term-limit-referendum-a-warning-to-latin-american-autocrats>; Daniel Ramos & Monica Machicao, *Bolivia's Morales Accepts Defeat in Term Limit Referendum*, REUTERS (Feb. 23, 2016, 8:02 PM), <https://www.reuters.com/article/us-bolivia-referendum-idUSKCN0VX09E>.

179. See Corte Constitucional [C.C.] [Constitutional Court], febrero [Feb.] 2, 2010, Expediente [Decision] C-141/10 (Colom.).

180. See Versteeg et al., *supra* note 44.

181. See Marco A. Gandasegui, Jr., *The 1998 Referendum in Panama: A Popular Vote Against Neoliberalism*, 26 LATIN AM. PERSP. 159, 164 (1999); Ramos & Machicao, *supra* note 154.

182. See *Bolivia Court Allows President Morales to Run for Fourth Term*, *supra* note 155.

183. See Corrales & Penfold, *supra* note 31, at 160.

184. See Laurence Blair, *Paraguay's Re-election Crisis Is Over—for Now*, WORLD POL. REV. (May 2, 2017), <https://www.worldpoliticsreview.com/articles/22024/paraguay-s-re-election-crisis-is-over-for-now>.

185. See CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY [CONSTITUTION] June 20, 1992, art. 229.

186. See Simon Romero, *Protests Erupt in Paraguay over Efforts to Extend President's Term*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/world/americas/paraguay-protests-horacio-cartes.html>.

187. See *id.*

IV. THE CAUSES AND CONSEQUENCES OF NON-COMPLIANCE

The prior two Parts showed that, while presidential term limits are extremely common, compliance with those provisions is problematic. Incumbents use a range of tools, including constitutional amendment, constitutional replacement, or the judiciary, to extend their tenure in office. This Part asks two questions using the data of the prior section.

First, why are presidents often so determined to evade presidential term limits? We root the issue in incentives. Second, what are the consequences of presidential evasion of term limits? While the consequences obviously vary by case, we think they are often very negative for constitutional democracy. Thus, the term limits problem is one in urgent need of solutions.

A. THE CAUSES OF EVASION

What explains this pattern of weak compliance with relevant constitutional limits? A range of factors are likely at play, including a limited history of respect for constitutional limits in certain countries, the difficulty of constraining the power of already extremely long-serving and dominant presidents, and the insufficient entrenchment of relevant limits. However, we assert that the core problem is one of presidential incentives.

Where a president has already served substantially more than two terms, they may gain so much power that it becomes extremely difficult to dislodge them. They may enjoy strong public support and tight control over the military, and thus have a high capacity to withstand the threat of forcible removal from office.¹⁸⁸

Another problem is that some countries, in which term limits have been removed, have imposed weak entrenchment of their term limits, and require only ordinary legislative majority requirements for the amendment or repeal of such provisions. They have not increased entrenchment to these provisions or placed them on a higher constitutional “tier” that requires some form of heightened super-majority or double-majority support.¹⁸⁹ Countries that have made term limits especially easy to change are likely to be vulnerable to attacks on those limits.

In Africa, for example, Tull and Simons note that, of the fifteen cases of successful amendment to term limits, five of these occurred by way of amendments approved by parliaments using procedures similar to those for ordinary statutes.¹⁹⁰ This was the case in Namibia in 1999, Togo in 2002, Gabon in 2003, Cameroon in 2008, and Djibouti in 2010.¹⁹¹

188. See Nic Cheeseman, *Presidents for Life Spell Danger*, MAIL & GUARDIAN (Apr. 12, 2019), at <https://mg.co.za/article/2019-04-12-00-presidents-for-life-spell-danger>.

189. See Maltz, *supra* note 1, at 141 (“[E]ntrenchment would not ensure compliance with presidential term limits, but it would increase the costs of abrogation.”).

190. See Tull & Simons, *supra* note 53, at 87.

191. *Id.* at 53 fig.2.

In contrast, heightened super-majority requirements might be more likely to lead to the defeat of proposed amendments to presidential term limits, even in cases where a dominant party controls the legislature. In Burundi, for example, before turning to the court to ratify his bid for a third term, President Nkurunziza had first sought formally to amend relevant term limits through the legislature.¹⁹² The proposed amendments failed to gain the necessary super-majority of the Burundi Parliament by only a single vote.¹⁹³ This failure was largely because Article 96 of the Burundi Constitution required amendments to receive the support of at least 80% of the legislature,¹⁹⁴ an especially high super-majority requirement in global terms.¹⁹⁵

A lack of constitutional entrenchment does not fully explain why presidents often choose not to comply with term limits, and it is far from a complete protection against evasion attempts. As noted above in Part III, in many cases, incumbents have used tools other than formal amendment to achieve their goals, such as constitutional replacement and judicial review. Merely creating a high level of entrenchment against constitutional change will not prevent the use of these other evasion tactics, and may indeed provide additional incentive for their use, because they provide a substitute for formal change.

Presidents facing a binding term-limit face a range of incentives *not* to leave office. One incentive for a president to evade a term limit is to prevent or delay the almost immediate reduction in a president's power and privileges once they leave office. Some democracies include provisions maintaining some of a president's privileges once they leave office, for example by continuing to provide them with a salary, generous allowances, security, and staff.¹⁹⁶ As we explore further below, the continued possession of presidential privileges is extremely important to providing presidents the incentive to leave at the constitutionally appointed time.

Even where they retain these privileges, presidents will inevitably face some loss in their power and influence when they leave office. In addition,

192. See Vandeginste, *supra* note 139, at 43 n.1.

193. See *id.*

194. See *id.*

195. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 361 tbl.4 (1994) (showing that most required legislative majorities are around 67%).

196. See Former Presidents Act, 3 U.S.C. § 102 (2018); Members of Parliament Retiring Allowances Act, R.S.C. 1985, c. M-5.; see also WENDY GINSBERG & DANIEL J. RICHARDSON, CONG. RES. SERV., RL34631, FORMER PRESIDENTS: PENSIONS, OFFICE ALLOWANCES, AND OTHER FEDERAL BENEFITS (2016); George Bowden, *Theresa May's Salary Dwarfed By Her £2m Downing Street Perks*, HUFFINGTON POST (July 20, 2017), https://www.huffingtonpost.co.uk/entry/theresa-may-pay-salary-benefits-perks_uk_5970be18e4b0aa14ea7810c4; Shikha Goyal, *Benefits Given to Former Prime Minister and President of India*, JAGRAN JOSH (June 21, 2018), <https://www.jagranjosh.com/general-knowledge/benefits-given-to-former-prime-minister-and-president-of-india-1529585888-1>; Paul Karp & Nick Evershed, *Tony Abbott Gets \$90,000 Raise on Backbencher's Salary Now He's a Retired PM*, GUARDIAN (May 30, 2019, 2:18 PM), <https://www.theguardian.com/australia-news/2019/may/30/tony-abbott-gets-100000-raise-on-backbenchers-salary-now-hes-a-retired-pm>.

leaving office inevitably means losing the ability to protect themselves from the threat of future prosecution, imprisonment, or confiscation of their assets. There is an increasing trend globally toward holding former leaders accountable for international crimes, a risk which constitutions cannot “insure” former presidents against.¹⁹⁷ This is one reason, Tom Ginsburg has suggested, that democratic elites may agree to bind themselves to a minimum set of constitutional guarantees.¹⁹⁸ Guarantees of this kind, however, will always be subject to the danger of downstream renegotiation or nullification.¹⁹⁹

In new or fragile democracies, presidents may face few countervailing pressures to abide by term limits. In more consolidated constitutional systems, political parties may exert pressure on presidents to abide by the terms of a democratic constitution. Because parties have a long-term interest in preserving their reputation for respecting constitutional limitations, they may encourage the president to step aside in favor of another member of the party. This reflects a broader pattern in which long-term political actors may contribute to what political scientists have called “self-enforcing” or “self-stabilizing” constitutional term limitations.²⁰⁰ As scholars such as Tonja Jacobi, Sonia Mittal, and Barry Weingast have argued, constitutional term limits can be self-stabilizing in two key ways.²⁰¹

First, constitutional term limits “lower[] the stakes of [democratic] politics,” and therefore give political actors an incentive to support constitutional action over extra-constitutional action.²⁰² Second, constitutional term limits create a focal point for co-ordination among political actors, which can help solve problems of co-ordination in ordinary politics.²⁰³ Furthermore, constitutional term limits are a classic mechanism for lowering the stakes of democratic elections of a political party because they reduce the prospect of a

197. See, e.g., *Leaders Facing Justice 1945–2013*, COUNCIL OF FOREIGN REL., <https://www.cfr.org/timeline/leaders-facing-justice>. See generally Jean-Baptiste Jeangène Vilmer, *The African Union and the International Criminal Court: Counteracting the Crisis*, 92 INT’L AFF. 1319 (2016) (explaining countries’ participation in the Rome Statute of the International Criminal Court to hold those in power accountable after their reign ends); Amy Gunia, *The Philippines Has Officially Left the International Criminal Court*, TIME (Mar. 18, 2019), <https://time.com/5553323/philippines-leaves-international-criminal-court> (explaining one country’s decision to leave the International Criminal Court).

198. See Tom Ginsburg, *Constitutional Courts in East Asia*, in COMPARATIVE CONSTITUTIONAL LAW IN ASIA 47, 48–49 (Rosalind Dixon & Tom Ginsburg eds., 2014); Rosalind Dixon & Tom Ginsburg, *The South African Constitutional Court and Socio-Economic Rights as “Insurance Swaps,”* 4 CONST. CT. REV. 1, 4 (2011); Rosalind Dixon and Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, 15 INT’L J. CONST. L. 998 (2017) (discussing using constitutional judicial review as a form of personal insurance).

199. See Dixon & Ginsburg, *supra* note 198, at 1000.

200. Tonja Jacobi et al., *Creating a Self-Stabilizing Constitution: The Role of the Takings Clause*, 109 NW. U. L. REV. 601 (2015).

201. *Id.* at 603–606.

202. *Id.* at 604–05.

203. See *id.* at 605–06. Jacobi, Mittal and Weingast also identify a third condition: a constitution’s capacity for change, or “adaption.” *Id.* at 606–07.

single party gaining long-term control of the state or state power by winning a single election.²⁰⁴

Many fragile democracies, however, lack strong, independent political parties with this kind of long-term interest in the alternation of political power.²⁰⁵ Parties are often a vehicle for a single candidate to run for office, and they define their policies in terms identical to those of a president or leader. Rightly or wrongly, a political party's electoral fate is often perceived by party members as tied to that leader. When it comes time for a president to leave office under a term limit, the party thus has little incentive to encourage a president to comply with the relevant constitutional limitation. Instead of encouraging a president to leave office, parties in a fragile democracy may actively encourage a president to stay beyond the constitutional term limit as a means of increasing the chances that the party itself will continue to hold power.²⁰⁶

Latin America is a sobering reminder of the extraordinary length to which presidents will go to overcome even a well-drafted constitutional design in pursuit of their goals to remain in office. For example, both Venezuela and Ecuador attempted to prevent changes to the "fundamental structure" of its constitution by requiring a more demanding procedure to make any constitutional amendments that would extend a president's tenure beyond the constitutional term limit.²⁰⁷ Nonetheless, presidents were still able to circumvent constitutional term limits using a procedure with a lower standard, and then have high courts they controlled validate those maneuvers.²⁰⁸

An even more dramatic example is given by countries like Nicaragua, Bolivia, and Honduras, where courts issued decisions directly removing the presidential term limits. In Bolivia, the regime-dominated court did so after President Morales had already lost a referendum that would allow him to run for another term.²⁰⁹ Honduras was even more dramatic. The Honduran Court removed a strict one-term limit that was part of the original 1982 Constitution, which included an "eternity" clause that supposedly made the Constitution unamendable and punished any political attempt to change the limit.²¹⁰ While an earlier president, Manuel Zelaya, had been removed in a military coup after

204. *Id.*

205. On the role of weak parties in undermining presidential term-limits, see, for example, Baker, *supra* note 8, at 297.

206. See Ginsburg et al., *supra* note 1, at 1828; Vandeginste, *supra* note 139, at 45.

207. See Dixon & Landau, *supra* note 10, at 448–49.

208. See *supra* text accompanying note 99.

209. See *supra* text accompanying notes 154–157.

210. See ASAMBLEA NACIONAL CONSTITUYENTE [CONSTITUTION] Jan. 20, 1982, art. 239 (HOND.) ("A citizen who has held the Office of President under any title may not be President or a Presidential Designate. Any person who violates this provision or advocates its amendment as well as those that directly or indirectly support him shall immediately cease to hold their respective offices and shall be disqualified for ten years from holding any public office."); *Id.* at art. 374 (making the reelection provision unamendable).

allegedly seeking to change the clause,²¹¹ incumbent president Juan Orlando Hernandez successfully evaded the limit by leaning on the judiciary to do his dirty work for him.²¹²

B. THE RISKS POSED BY TERM LIMIT EVASIONS

This pattern of non-compliance with constitutional term limits has significant costs, or risks, from a democratic perspective. Some scholars suggest that the formal removal of term limits constitutes a form of “hard” contravention, whereas constitutional over-staying is a “softer” form of contravention.²¹³ However, formal constitutional change and constitutional non-compliance both pose distinct dangers to constitutional democracy. Formal amendments permanently remove key democratic checks and balances, whereas non-compliance undermines basic commitments to the rule of law.

Presidents who simply ignore constitutional term limits are likely to undermine a culture of respect for the rule of law. A disregard for constitutional term limits can encourage disrespect of other constitutional limitations by other government officials, including limitations on their power and prohibitions against corruption. It may even encourage popular disobedience of legal rules and thus an increase in looting, violence, and other forms of disrespect for legal norms.

Other “informal” approaches to circumventing term limits can also put pressure on the rule of law. One of the hallmarks of the rule of law, most scholars agree, is that it involves respect for the independence of the judiciary and a willingness to follow judicial decisions.²¹⁴ Judicial independence is, of course, a question of degree.

Some scholars argue in favor of a “dialogic” or “departmentalist” approach to constitutional construction,²¹⁵ where legislative or executive officials are entitled to give narrow effect to court decisions with which they disagree, or to disregard certain aspects of courts’ reasonings. However, there is no suggestion

211. For an accounting of these events, see NOAH FELDMAN et al., REPORT TO THE COMMISSION ON TRUTH AND RECONCILIATION OF HONDURAS: CONSTITUTIONAL ISSUES (2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1915214.

212. See Landau et al., *supra* note 142, at 63–65.

213. See Maltz, *supra* note 1, at 128.

214. See generally RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tom Ginsberg & Tamir Moustafa eds., 2008) (offering a compilation of articles discussing authoritarian regimes); Guillermo O'Donnell, *Quality of Democracy: Why the Rule of Law Matters*, 15 J. DEMOCRACY 32 (2004) (explaining the importance of democracy).

215. See, e.g., Rosalind Dixon, *Constitutional “Dialogue” and Deference*, in CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS 161 (Geoffrey Sigalet et al. eds., 2019); Jacob T. Levy, *Departmentalism and Dialogue*, in CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS 68 (Geoffrey Sigalet et al. eds., 2019); Geoffrey Sigalet et al., *Introduction to CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS* 1 (Geoffrey Sigalet et al. eds., 2019).

among constitutional scholars that the executive should be free to influence the outcome of specific judicial decisions.²¹⁶

In Burundi, for example, there were several reports of direct interference by the President and his supporters regarding the independence of the Burundi Constitutional Court in 2015 during its deliberations over the application of presidential term limits.²¹⁷ The Vice President of the Court, Sylvere Nimpagaritse, refused to sign his name to the opinion and immediately fled to Rwanda upon it being handed down.²¹⁸ In a Radio France International broadcast, Nimpagaritse reported that the Burundi Constitutional Court had been subject to intense political pressure in the lead-up to its decision, and that several judges had received death threats before changing their vote to uphold the constitutionality of the President's third term.²¹⁹ Later, in Belgium, Nimpagaritse identified specific judges in the majority who changed their position due to such threats and discussed the threats made against him and his family on behalf of the President.²²⁰

Formal processes of amending or repealing term limits can erode democratic checks and balances. In a few cases, presidents have been forced to commit to constitutional changes that *limit* their power in order to obtain political support for proposed changes to constitutional term limits. John Carey notes that concessions of this kind can make the removal of term limits significantly less damaging to democracy.²²¹ Scholars, such as Javier Corrales and Michael Penfold, suggest that in some cases, where cross-party political negotiations are at play, changes to term limits "can enhance accountability and strengthen checks and balances."²²²

Presidents may make more substantial concessions to the opposition and trade broader changes that limit the power of the presidency in exchange for support to extend the term limit. In Argentina, for example, to gain support for proposed changes to existing term limits, President Carlos Menem was required to work with opposition legislators.²²³ To secure their agreement for a formal

216. See generally Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008) (arguing that this would create some sort of "dead hand" control over constitutional interpretation).

217. See Vandeginste, *supra* note 139, at 53.

218. Busingye Kabumba, *A Legal Expert's View on Burundi Term Limits Saga*, OBSERVER (May 13, 2015), <https://observer.ug/viewpoint/37809-a-legal-expert-s-view-on-burundi-term-limits-saga>; Vandeginste, *supra* note 139, at 53.

219. See Vandeginste, *supra* note 139; Kabumba, *supra* note 218.

220. See Jerome Delay, *Exiled Burundi Judge Says Court Forced to Back President*, SAN DIEGO UNION-TRIB. (May 6, 2015, 10:44 PM), <http://www.sandiegouniontribune.com/sdut-burundi-opposition-politician-arrested-over-2015may06-story.html>. Note that this account was also contested. See *Burundi Court Backs President Nkurunziza on Third-Term*, BBC NEWS (May 5, 2015), <https://www.bbc.com/news/world-africa-32588658> (disputing the Vice President's account of the court receiving these threats).

221. See Carey, *supra* note 53.

222. See Corrales & Penfold, *supra* note 31, at 162.

223. See Carey, *supra* note 53, at 128; Corrales & Penfold, *supra* note 31, at 160 (describing the so-called "Olivos Pact"); Ginsburg et al., *supra* note 1, at 1831–32.

change to term limits, Menem also agreed to reverse previous changes limiting the independence of the Argentinian Supreme Court—Menem agreed to restore the previous size of the bench and to appoint new, more independent judges.²²⁴ This meant that the court was able to act as a greater check on the President and his constitutional ambitions.²²⁵

This will not be the case where concessions are simply designed to co-opt members of the political opposition without making real changes. In the Democratic Republic of Congo, for example, President Kabila attempted to diffuse criticism of his attempts to circumvent term limits by appointing the leader of the opposition as Prime Minister.²²⁶ It was unlikely that the appointment was a genuine attempt to share power with the opposition or reduce the powers of the president.

Furthermore, the process of amending constitutional term limits may more commonly create a window of opportunity for would-be authoritarian leaders to achieve even broader forms of anti-democratic change. This is especially true where presidents choose to repeal term limits via a process of wholesale constitutional replacement, but similar effects may also be achieved by amendment.

In Venezuela, for example, formal changes to existing constitutional term limits were made by President Hugo Chavez without any meaningful opposition involvement or support.²²⁷ The first attempt, a referendum that narrowly failed in 2007, was paired with a series of measures that would have greatly expanded and centralized the power of the presidency.²²⁸ While most of the broader measures were dropped when Chavez passed a narrower measure eliminating term limits in 2009, he was able to ultimately pass these measures through a series of ordinary laws.²²⁹

Likewise, in Algeria, the parliament voted in 2008 to repeal presidential term limits, which would allow President Abdelaziz Bouteflika to seek a third

224. Carey, *supra* note 53, at 128; Corrales & Penfold, *supra* note 31, at 160 (describing the so-called “Olivos Pact”).

225. See John M. Carey, *Presidentialism and Representative Institutions*, in *CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA* 11, 20 (Jorge I. Domínguez & Michael Shifter eds., 2d ed. 2003). This also included a decision to reject bids to interpret the Constitution so as to allow Menem a third term in office. Carey, *supra* note 53, at 128.

226. See Jason Burke, *Joseph Kabila Makes Opposition Leader DRC Prime Minister*, *GUARDIAN* (Nov. 17, 2016, 12:00 PM), <https://www.theguardian.com/world/2016/nov/17/joseph-kabila-makes-opposition-leader-samy-badibanga-drc-prime-minister>.

227. See Corrales & Penfold, *supra* note 31, at 161; Ginsburg et al., *supra* note 1, at 1831–32.

228. See Simon Romero, *Venezuela Hands Narrow Defeat to Chavez Plan*, *N.Y. TIMES* (Dec. 3, 2007), <https://www.nytimes.com/2007/12/03/world/americas/03venezuela.html?mtrref=www.google.com&gwh=77CA77CD8541974C312BCAB406D952CF&gwt=pay>.

229. See, e.g., Joel D. Hirst, *Chavez Alters Venezuela’s Constitutional Regime*, *COUNCIL ON FOREIGN REL.*, (Dec. 20, 2010), <https://www.cfr.org/expert-brief/chavez-alters-venezuelas-constitutional-regime> (“Using the gradual passage of ‘organic laws’ by his overwhelming majority in the National Assembly, Chavez has enacted almost all aspects of his proposed 2007 constitution.”).

term in office.²³⁰ In passing these amendments, the parliament also approved a parallel set of constitutional amendments that increased the scope of presidential power and reduced the power of the prime minister.²³¹ This kind of “bundling” is quite common in processes of formal constitutional change, especially those that involve voting by ordinary voters at a referendum.

In Burundi, voters were asked to vote on fundamental constitutional changes as a single bundle.²³² Leading news reports suggested that the ballot paper did not contain any specific proposal for constitutional change, but rather asked voters to vote “yes” or “no” in favor of the “constitutional referendum of May 2018.”²³³ As a result, the previous two-term limit on presidents was removed and the length of each term increased from five to seven years.²³⁴ The changes also resulted in the creation of new offices for a prime minister that was appointed by the president and a ceremonial vice president, which would be of a different ethnicity to the president, and the removal of provisions that required two vice presidents of different ethnicities.²³⁵ Moreover, the bundled vote led to the removal of the right to representation in cabinet for small parties.²³⁶ It also led to the removal of other power-sharing principles, such as norms of parity in various parts of government service, including the police,²³⁷ that were part of the “Arusha Accords” that helped end the previous civil war in Burundi.²³⁸ The net effect of these changes, most commentators agreed, undermined Burundi’s status as a stable, multi-ethnic democracy, and impaired the capacity of the political opposition from rival ethnic groups to effectively challenge the President.²³⁹ As a result, the President’s practice of issue bundling relaxed presidential term limits, which effectively expanded presidential power and removed commitments to a multi-party, multi-ethnic democracy.²⁴⁰

In most democracies, the issue bundling was not as crude as in Burundi, where voters were given no formal legal opportunity to support selected or limited forms of constitutional change. But democratic leaders can still, and often, draw political connections between distinct legal proposals for change, so

230. See Heba Saleh, *Algeria Lifts Presidential Term Limits*, FIN. TIMES (Nov. 12, 2008), <https://www.ft.com/content/2e34aa3c-b0b8-11dd-8915-0000779fd18e>.

231. *Id.*

232. See Jason Burke & Ignatius Ssuuna, *Burundi Votes in Referendum over President’s 2034 “Power Grab,”* GUARDIAN (May 17, 2018, 4:08 PM), <https://www.theguardian.com/world/2018/may/17/burundi-referendum-presidential-powers-tensions-high>.

233. *See id.*

234. *See Burundi Votes in Referendum That Could Prolong President’s Rule*, ENCA (May 17, 2018, 6:03 PM), <https://www.enca.com/africa/burund-votes-in-referendum-that-could-prolong-presidents-rule>.

235. See Bouka & Jackson, *supra* note 137; Burke & Ssuuna, *supra* note 232.

236. See Bouka & Jackson, *supra* note 232.

237. *See id.*

238. *See Burke & Ssuuna, supra* note 232.

239. See Eyder Peralta, *Tension Grows Around Referendum in Burundi*, NPR (May 16, 2018, 6:11 PM), <https://www.npr.org/sections/thetwo-way/2018/05/16/611668253/tension-grows-around-referendum-in-burundi>.

240. *See Bouka & Jackson, supra* note 137.

that supporters of one change vote in support of other changes that they know less about or have less strong views about.

Thus, the formal removal of constitutional term limits can pose a double danger to democracy. It can not only lead to a reduction in the competitiveness of presidential elections and greater risk of informal abuses by presidents, but also a formal increase in the scope of presidential power.²⁴¹ The process of overcoming term limits may also pose other dangers to democracy. It may provoke a form of political crisis that leads to the death or injury of hundreds of citizens and calls for military or martial rule.²⁴² Political crises almost always have somewhat unpredictable results. And they often threaten the stability of the existing constitutional order.²⁴³

V. SOLVING THE END-GAME PROBLEM: THE ROLE OF CONSECUTIVE TERM LIMITS

Constitutional designers can ameliorate the risks of term limit evasion by barring only consecutive terms. As noted above in Part II, a common model globally is the American one, where presidents are prohibited from regaining the presidency for their entire lives after serving two consecutive terms in office.²⁴⁴ A few systems go even further and prohibit reelection forever after only one term in office.²⁴⁵ This kind of term limit, however, maximizes the incentive problem. If presidents can never return to power, they may try to hold on to it at all costs.

In contrast, a less popular but still fairly common design choice is to bar only consecutive attempts at reelection. One of the first bans of this kind was in the Argentinian Constitution of 1853.²⁴⁶ As noted in Table 1, as of 2019, we find that eight percent of systems bar presidents from holding an immediately consecutive term after one term in office; while another seven percent bar them from doing so after holding two terms in office.²⁴⁷ In both designs, however, presidents can return to power later. We assert that such a model gives presidents greater incentives to leave office rather than seeking to bend term limits to their will.

A. CHANGING PRESIDENTIAL INCENTIVES

If presidents can one day stand again for election to the presidency, they face a different calculus as to the attractiveness of evasion attempts. While

241. See Ginsburg et al., *supra* note 1, at 1826.

242. See *id.*

243. *Id.* at 1849–50.

244. See *id.* at 1836.

245. See *id.* at 1837.

246. See Jorge Streb, *Reelection or Term Limits? The Short and the Long View of Economic Policy*, 26 ESTUDIOS DE ECONOMÍA [ECON. STUD.] 187, 193 (1999).

247. See *supra* text accompanying note 79; see also *supra* Table 1. We note that some presidential and semi-presidential systems (4% in our data) have rules that are ambiguous as to whether they are permanent or only consecutive bars. Sometimes, courts have clarified the meaning of these provisions.

compliance means foregoing the immediate powers and privileges of office, attempted evasion may risk undermining a leader's reputation in ways that damage their long-term reelection prospects.

Whether this long-term risk is sufficient to outweigh the immediate benefits of non-compliance will depend on a range of factors, including the age of an incumbent, as well as prevailing social, economic, and political conditions. The younger a president is, the lower the "discount rate" they will generally have when trading off current versus future political gains. All else being equal, younger presidents are more likely to respond to the incentives created by temporary bans on reelection.

Other factors may also affect a president's choice regarding whether to step down. If the economy is strong, for example, a risk-averse president may risk damaging their long-term chance of reelection, and instead pursue a high possibility of *immediate* reelection by seeking to repeal or circumvent current term limits.²⁴⁸ The same is true for presidents with a high rate of voter approval. Approval ratings indicate a high chance of reelection and strong support for formal constitutional amendment to make reelection possible.²⁴⁹ Conversely, if economic conditions are declining, or if a government is faced with voter dissatisfaction, a president may have greater reason to prioritize his or her chances of long-term reelection.²⁵⁰

There is strong empirical evidence to suggest that the prospect of later reelection is a relevant factor in presidents' actual decision-making. Corrales and Penfold identify eleven countries in Latin America that barred consecutive terms but allowed presidential reelection after one or two intervening terms.²⁵¹ In those eleven countries, they found that former presidents ran in 50% of elections in which they were eligible to run.²⁵² Some of these elections—Argentina in 2003, Bolivia in 1997 and 2002, Haiti in 2006, and Suriname in 2000 and 2005—actually featured more than one former president.²⁵³

There have been several recent instances of presidents "voluntarily" choosing to leave office at the end of their constitutionally appointed terms in office because of the possibility of running for reelection in the future. In Ecuador, as previously noted, Congress, in 2015, passed a constitutional amendment that allowed indefinite presidential reelection.²⁵⁴ This was done

248. See, e.g., Corrales & Penfold, *supra* note 31, at 164 (discussing the relevance of economic factors both to presidential reelection, and the chances of successful removal of term limits); see also Baker, *supra* note 8, at 291.

249. See, e.g., Michael S. Lewis-Beck & Tom W. Rice, *Presidential Popularity and Presidential Vote*, 46 PUB. OPINION Q. 534, 534 (1982); Maltz, *supra* note 1, at 132.

250. Maltz, *supra* note 1, at 132.

251. See Carey, *supra* note 53, at 125.

252. See Corrales & Penfold, *supra* note 31, at 163.

253. See *id.* In Europe, 17.4% of presidential races involved a former president or prime minister as a candidate. *Id.* at 163; see also Javier Corrales, *Latin America's Neocaudillismo: Ex-Presidents and Newcomers Running for President . . . and Winning*, 50 LATIN AM. POL. & SOC'Y 1, 6 (2008).

254. See *supra* text accompanying notes 144–148.

using the default procedure for amendment, rather than the more demanding procedure for constitutional changes that affect the “fundamental structure.”²⁵⁵ As a result, President Correa was able to avoid a popular referendum that the opposition sought and he feared.²⁵⁶

When faced with significant street protests, Correa agreed to bless a small but significant last-minute change to the amendment: the elimination of presidential term limits that would take place only after the next election in 2017.²⁵⁷ Effectively, this change meant that Correa would need to leave power in 2017, although he could potentially run for reelection and remain in the presidency indefinitely. His hand-picked successor, Lenin Moreno, won a narrow victory in the 2017 election.²⁵⁸ However, as explained in more detail below, Moreno quickly turned against Correa, and one of his first major acts was to hold a successful referendum reinstating presidential term limits, blocking Correa’s return to power.²⁵⁹

The Ecuadorian case has been celebrated as one of “democracy’s near misses”: a set of cases where democratic constitutionalism was close to suffering major erosion towards authoritarianism, but escaped long-term damage in the end.²⁶⁰ Correa was widely viewed as a significant threat to democracy.²⁶¹ He took a number of formal and informal steps to consolidate power, including replacing the existing constitution with a new one unilaterally drafted by his political allies, and used an expanding set of legal tools to harass opposing political, civil society, and media groups.²⁶² Scholars have asserted that Ecuador had already eroded into a competitive authoritarian regime during Correa’s tenure.²⁶³ The temporary term limit that emerged from the 2015 crisis and forced Correa’s exit from power should thus be given considerable credit in salvaging a democratic constitutional order.

We do not know exactly why Correa agreed to the provision preventing him from running in the 2017 election, but it seems highly likely that the fairly young incumbent president did so because he thought he could return to power

255. See REFORMA DE LA CONSTITUCIÓN, 2008, art. 441 (Ecuador).

256. See Megan Alpert, *Correa’s Gamble*, ABC (Dec. 14, 2015, 2:19 PM), <https://foreignpolicy.com/2015/12/14/correas-gamble-ecuador>.

257. See, e.g., Thalia Flores, *The Official Majority Approves the Indefinite Reelection in Ecuador*, ABC (Dec. 5, 2015, 9:40 PM), <https://www.abc.es/internacional/abci-mayoria-oficialista-aprueba-reeleccion-indefinida-ecuador-201512041908noticia.html>.

258. See *Ecuador Election: Socialist Lenin Moreno Declared Winner*, BBC NEWS (Apr. 4, 2017), <https://www.bbc.com/news/world-latin-america-39498404>.

259. See *infra* text accompanying notes 300–302.

260. See Tom Ginsburg & Aziz Huq, *Democracy’s Near Misses*, 29 J. DEMOCRACY 16, 26 (2018).

261. See generally Marc Becker, *The Stormy Relations Between Rafael Correa and Social Movements in Ecuador*, 40 LATIN AM. PERSPECTIVES 43 (2013); Carlos de la Torre & Andrés Ortiz Lemos, *Populist Polarization and the Show Death of Democracy in Ecuador*, 23 DEMOCRATIZATION 221 (2016).

262. See generally Becker, *supra* note 261; de la Torre & Lemos, *supra* note 261.

263. See Steven Levitsky & James Loxton, *Populism and Competitive Authoritarianism in the Andes*, 20 DEMOCRATIZATION 107, 121 (2013) (stating that the Ecuadorian constitution-making process by Correa in 2008 “ushered in a competitive authoritarian regime”).

later. Indeed, some provisions of the design made it possible for Correa to return without sitting out a full presidential term.²⁶⁴ Many analysts predicted economic and fiscal problems for Ecuador during the period in which Correa left power,²⁶⁵ making it particularly attractive for him to take a break before making a triumphant return. At the same time, the case shows that temporarily forcing would-be autocrats out of power may have dramatic effects on a country's democratic trajectory, even when their own party retains the presidency.

In Panama, during the lead-up to the 2014 presidential election, President Martinelli enjoyed a 60% approval rating but faced a binding term limit that prevented him from seeking reelection.²⁶⁶ He initially sought to propose constitutional changes aimed at removing these limits from the Constitution.²⁶⁷

First, Martinelli proposed a formal constitutional amendment to allow presidents to serve two consecutive terms.²⁶⁸ However, he faced significant resistance from within his own party.²⁶⁹ His Vice President, Juan Carlos Varela, publicly opposed the measure, and effectively began his bid to challenge Martinelli for the presidency.²⁷⁰

Second, Martinelli proposed measures designed informally to reduce the effect of term limits by seeking to appoint new justices to the Supreme Court of Panama who would be willing to invalidate the existing term limits as an unconstitutional provision.²⁷¹ Nicaragua provided an important model for informal change of this kind.²⁷² In proposing to recreate a "Fifth Court" or chamber in the Supreme Court that would be responsible for constitutional cases, and that would be staffed entirely by judges appointed by the President, Martinelli

264. A provision of the Ecuadorian Constitution called the "crossed-death" provision could potentially allow the president to dissolve the legislature and call new elections for both the executive and legislative branches under certain conditions. See REFORMA DE LA CONSTITUCIÓN, 2008, art. 148 (ECUADOR).

265. See, e.g., Andrés Oppenheimer, *Correa's "Economic Miracle" in Ecuador Was Actually a Monumental Sham*, MIAAMI HERALD (Mar. 3, 2017, 7:00 AM), <https://www.miamiherald.com/news/local/news-columns-blogs/andres-oppenheimer/article136054198.html>.

266. See Juan Zamorano, *Panama's Vice President Wins Presidential Election*, USA TODAY (May 5, 2014, 12:06 AM), <https://www.usatoday.com/story/news/world/2014/05/05/panama-presidential-election/8710369/>; see also Kevin Lees, *Panamanian Presidential Race is All About Martinelli*, SUFFRAGIO (May 2, 2014), <http://suffragio.org/2014/05/02/panamanian-presidential-race-is-all-about-martinelli/>.

267. See Kevin Lees, *Meet Juan Carlos Varela, Panama's New President*, SUFFRAGIO (May 4, 2014), <http://suffragio.org/2014/05/04/meet-juan-carlos-varela-panamas-new-president>.

268. See *id.*

269. See *id.*

270. See *id.*; Christine Murray & Elida Moreno, *Panama Leader's Deputy-Turned-Rival Wins Presidency*, REUTERS (May 5, 2014, 5:50 PM), <https://www.reuters.com/article/us-panama-election/panama-leaders-deputy-turned-rival-wins-presidency-idUSBREA4308520140505>.

271. See Juan Carlos Hidalgo, *A Brewing Institutional Crisis in Panama*, CATO INST. LIBERTY (Feb. 1, 2012, 10:57 AM), <https://www.cato.org/blog/brewing-institutional-crisis-panama>.

272. See *id.*

sought to use similar tactics.²⁷³ He only ultimately backed down in the face of widespread public protest.²⁷⁴

When these attempts failed, Martinelli chose to step aside and declined to contest the 2014 presidential election.²⁷⁵ Instead, Martinelli chose to support former Housing Minister, Jose Domingo Arias, as a presidential candidate, and to promote Martinelli's wife, Marta Linares, as a Vice Presidential candidate.²⁷⁶ He broke with convention for an ex-president and actively campaigned for Arias and his own wife.²⁷⁷ Martinelli also repeatedly defended Arias' achievements in reducing unemployment and promoting economic growth, and warned that these gains could be reversed if the opposition's candidates were elected.²⁷⁸ Martinelli took on an active campaign role despite the risk of corruption and other criminal charges that he was facing.²⁷⁹ As a result of these investigations, in 2015 Martinelli left Panama and moved to the United States, where he faced extradition proceedings,²⁸⁰ before subsequently returning to Panama.

Martinelli's decision to step down from the presidency likely reflected a desire to maintain his long-term reputation and to preserve his capacity to run in future presidential elections after the two-term "cooling off" period for which the Constitution provides. He sought to run for mayor of Panama City in 2019 and would have been the front runner, but the Electoral Court rejected his candidacy as he failed to comply with residency requirements since he fled to the United States for several years before returning to Panama.²⁸¹ He has also stated that he intends to be a candidate for president in 2024 following the two-term cooling off period.²⁸²

We add one additional piece of relevant evidence. Despite being a country with considerable political turmoil, Brazil has nonetheless been devoid of attempts to eliminate or loosen term limits. Brazil has had two presidential

273. *See id.*

274. *See* Lees, *supra* note 267 ("[V]oters weren't prepared to back Martinelli's 'extraconstitutional' workaround to retain power for another five years.").

275. *See* Christine Murray & Elida Moreno, *Panama Election to Test Martinelli's Hold on Power*, REUTERS (May 1, 2014, 10:34 AM), <https://af.reuters.com/article/worldNews/idAFKBN0DH37A20140501>.

276. *See* *Panama Election: Juan Carlos Varela Thwarts Rival by Winning Presidency*, GUARDIAN (May 4, 2014, 10:08 PM), <https://www.theguardian.com/world/2014/may/05/panama-election-juan-carlos-varela-thwarts-rival-by-winning-presidency>.

277. *See* Lees, *supra* note 267; Zamorano, *supra* note 266.

278. Lees, *supra* note 267; Zamorano, *supra* note 266.

279. *See* Randal C. Archibold, *Incumbent's Party Loses Presidency in Panama*, N.Y. TIMES, May 5, 2014, at A.11 (suggesting that Arias and Linares' candidacy were in part designed to guard against this risk).

280. *See* Orlando J. Pérez, *Panama: Democracy Under the Shadow of Corruption*, 37 REVISTA DE CIENCIA POLÍTICA [POL. SCI. MAG.] 519, 525 (2017); *Scandal in Panama: No Chavez, but No Prize*, ECONOMIST (Feb. 5, 2015), <https://www.economist.com/the-americas/2015/02/05/no-chavez-but-no-prize>.

281. Stefanie Eschenbacher & Elida Moreno, *Panama Tribunal Rules Ex-President Martinelli Cannot Run in Election*, REUTERS (Apr. 26, 2019, 8:24 AM), <https://www.reuters.com/article/us-panama-election-martinelli/panama-tribunal-rules-ex-president-martinelli-cannot-run-in-election-idUSKCN1S21Q2>.

282. *Id.*

removals via impeachment since its return to democracy,²⁸³ and many other crises, but no serious attempts at evasion of term limits. In some cases, such as during and after the presidency of the popular incumbent Luiz Inacio Lula da Silva, the possibility of a return to power was clearly relevant. Lula planned on running for power in 2018, after his successor, Dilma Rousseff, was impeached and removed. However, his candidacy was stopped by a corruption investigation that left him in jail.²⁸⁴

These examples might be added to others, such as the case of Cristina Kirchner in Argentina, which is considered in more detail below, in which the prospect of a subsequent return to power seems to have impacted presidential decisions not to proceed with evasion attempts. These examples are not, of course, a proper “test” of our theory, and we do not attempt such a test here. An empirical test would be, at any rate, difficult to carry out in a convincing way, given the relative rarity of the consecutive model and the large number of factors that impact evasion attempts and their success.

B. ARE CONSECUTIVE BANS STRONG ENOUGH?

One response to our argument above may be that weak or temporary term limits are in fact “successful” in avoiding evasion only because term limits merely *defer*, rather than reduce, the dangers to democracy posed by personalist presidential rule. As we noted above, many presidents facing temporary bans on reelection go on to stand at subsequent democratic elections.²⁸⁵ Some have also ultimately re-assumed the role of the would-be authoritarian leader after returning to power (for example, Russian President Vladimir Putin, Congolese President Denis Sassou-Nguesso, and Dominican President Rafael Trujillo in the 1940s).²⁸⁶ It remains to be seen whether some recent Latin American presidents, such as Martinelli, will succeed in recapturing the presidency.

283. See Alexandra Rattinger, *The Impeachment Process of Brazil: A Comparative Look at Impeachment in Brazil and the United States*, 49 U. MIAMI INTER-AM. L. REV. 129, 146–150 (2017) (discussing impeachment of Presidents Collor and Rousseff).

284. See Phillips, *supra* note 97. We note that some countries with a consecutive term limit have had them loosened or eliminated in recent years in Latin America. However, these attempts have often involved the wholesale replacement of the constitution, not a targeted amendment of the term limit. Venezuela, Ecuador, and Bolivia, for example, all had a one consecutive term limit before the ascension to power of Presidents Chavez, Correa, and Morales, respectively. Each president, as one of their first acts in office, called Constituent Assemblies that replaced their constitutions, and these new constitutions, promulgated in 1999, 2008, and 2009, all allowed presidents to serve two consecutive terms in office. But these constitutional conventions did not seem primarily aimed at loosening term limits; instead they were aimed at a number of ideological and policy goals of the different leaders, most importantly the “refound[ing]” of their respective states. See David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923, 951 (2013). As noted by Versteeg et al., it is often difficult to find a change to a term limit as the primary goal of a wholesale constitutional replacement, although such a process may well change the term limit once it has been activated. See Versteeg et al., *supra* note 4.

285. See *supra* notes 91–97 (discussing several former presidents in Chile, Comoros, and Brazil who ran for non-consecutive presidential reelection).

286. Ginsburg et al., *supra* note 1, at 1850 (discussing Putin and Trujillo); *Congo Leader Nguesso Promises Referendum over Third Term*, BBC NEWS (Sept. 23, 2015), <https://www.bbc.com/news/world-africa-34336471>;

There are, however, two key dynamics that suggest that a delay in a president's ability to seek reelection is likely to reduce the risk of a slide toward authoritarianism, and not simply to postpone its occurrence.

First, a delay creates a window of opportunity for alternative leaders to emerge. When a president steps down from power, his or her successor will often begin to build up power, thus blunting the consolidation of power of the prior incumbent.²⁸⁷ An important benefit of non-consecutive term limits, therefore, is that term limits can provide a window of opportunity for the strengthening of political parties as structures independent from the individual president or leader.

Sometimes, this occurs because the president's chosen successor, lacking the advantages of the incumbent, loses the next election. Consider Panama, where, as noted above, President Martinelli stepped down and his chosen candidate lost to Juan Carlos Varela, his former vice president, turned adversary.²⁸⁸ Varela took power in an increasingly difficult economic and social situation, and his approval ratings declined fairly rapidly.²⁸⁹ However, he took advantage of the presidency to develop policies that built on, but were quite distinct from, Martinelli's.²⁹⁰ While he continued anti-poverty projects and large-scale public infrastructure projects, such as the expansion of the Panama Canal, he argued for increased transparency and action to combat global money laundering in Panama.²⁹¹ Furthermore, he introduced new policies designed to increase food affordability, and lobbied for rebuilding democratic and social institutions.²⁹² As a result, support for Varela's Democratic Revolutionary Party (PRD) increased and support for Martinelli's Cambio Democratico (CD) party declined.²⁹³ Between 2015 and 2018, 119,660 voters chose to leave the CD party, leaving it with only 338,842 registered members, compared to the PRD with 462,395 members.²⁹⁴ In effect, non-consecutive term limits allowed Varela to build his own base of support, while Martinelli's eroded.

Conor Gaffey, *Congo's Denis Sassou Nguesso Extends 32-Year Rule*, NEWSWEEK (Mar. 24, 2016, 12:13 PM), <http://www.newsweek.com/congos-denis-sassou-nguesso-extends-32-year-rule-440356>.

287. See *infra* notes 288–299 and accompanying text.

288. Lees, *supra* note 267.

289. See *Varela Seeks to Boost His Declining Popularity*, ECONOMIST (Jan 11, 2016), http://country.eiu.com/article.aspx?articleid=843838468&Country=Panama&topic=Politics&subtopic=Fo_6; Daniel Zovatto, *Panama Stands Up for Alternation*, BROOKINGS (May 17, 2014), <https://www.brookings.edu/opinions/panama-stands-up-for-alternation/>.

290. See John Murray Brown, *Panama's Juan Carlos Varela Promises to Improve Transparency*, FIN. TIMES (Apr. 7, 2016), <https://www.ft.com/content/7f4a0cd6-fc9c-11e5-b3f6-11d5706b613b>.

291. See *id.*

292. See Zovatto, *supra* note 289.

293. See Eric Jackson, *Parties and Presidential Candidates Lining Up*, PAN. NEWS (Jul 18, 2017), <https://www.thepanamanews.com/2017/07/parties-and-presidential-candidates-lining-up/>.

294. See *id.*

Strikingly, similar dynamics often hold even where the winner of the next election was handpicked by the old president. Consider two recent cases from Latin America: Colombia and Ecuador.

In Colombia, as noted above, the Colombian Constitutional Court issued a landmark, but highly unusual, decision denying President Alvaro Uribe the possibility of running for a third term.²⁹⁵ Uribe left power and supported his ally and fellow party-member Juan Manuel Santos in the 2010 election.²⁹⁶ With Uribe's support, Santos won the election.²⁹⁷ However, Santos developed an independent party base that pursued policies contrary to Uribe's own agenda, which eventually made the two men archenemies.²⁹⁸ Santos, for example, pursued peace with the FARC guerrilla movement, a policy Uribe detested, and eventually reimposed an absolute one-term limit on the presidency, reversing changes carried out by Uribe.²⁹⁹

Similarly, in Ecuador, President Correa agreed to leave power in 2017 and backed his close ally Lenin Moreno in the subsequent election.³⁰⁰ Like Santos, Moreno won a close election. After developing his own power base, Moreno quickly turned against Correa.³⁰¹ One of Moreno's first acts was to hold a successful referendum reimposing presidential term limits, foreclosing Correa's planned return to power.³⁰²

The independent political space we explain here will not always emerge. Sometimes, a former president will seek to continue to exert significant ongoing influence over the direction of a party, and independent bases of power will not always develop. They may indeed succeed in placing a puppet or shadow-president in office, a point we explore in more detail below.

Where presidents have a long-term chance to be re-elected, they also have an incentive to *undermine* the rise of credible alternative leaders and influence the party in a direction of non-independence. Tarnishing the standing of alternative party leaders, however, carries clear dangers for former presidents. For example, the party of former presidents may lose control of the presidency,

295. See Corte Constitucional [C.C.] [Constitutional Court], Febrero [Feb.] 2, 2010, Expediente [Decision] C-141/10.

296. See John Otis, *Colombia's New President: A Win for the U.S.*, TIME (June 21, 2010), <http://content.time.com/time/world/article/0,8599,1998279,00.html>.

297. See Sibylla Brodzinsky, *Juan Manuel Santos Wins Colombia Presidential Election*, GUARDIAN (June 21, 2010, 2:43 PM), <https://www.theguardian.com/world/2010/jun/21/juan-manuel-santos-colombia-president>.

298. Reyes L., *supra* note 88.

299. See José Miguel Vivanco & Juan Pappier, *Álvaro Uribe: Colombia Peace Deal's Unwelcome Critic*, MIAMI HERALD (Aug. 15, 2016, 7:52 PM), <https://www.miamiherald.com/opinion/op-ed/article95846637.html>; see also Reyes L., *supra* note 88 (noting, as well, that the new one-term limit may only be changed via referendum).

300. See Maggy Ayala & Marcelo Rochabrún, *Ecuador Votes to Bring Back Presidential Term Limits*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/world/americas/ecuador-presidential-term-limits.html>.

301. *Id.*

302. *Id.*

and thus, the ability to influence a range of other important appointments, including that of prosecutors and judges who may influence a subsequent prosecution against former presidents.³⁰³

Second, a delay helps counter the effect of certain behavioral biases among voters that tend to encourage a preference for the political *status quo*. A consecutive term limit gives voters an opportunity to reassess the reasons behind their support for the incumbent without the cloud of incumbency. Voters will then be in a better position to assess whether their support in fact reflects genuine political preferences for the incumbent or instead, common behavioral biases. Behavioral economics and social psychologists have shown that people are sometimes subject to forms of “endowment effect,” meaning they tend to place greater emphasis on certain kinds of losses over equivalent gains.³⁰⁴ The “endowment effect” can also create a persistent form of “status quo” bias in individual and collective decision-making.³⁰⁵ In a democratic context, a “status quo” bias results in voters preferring political incumbents simply because they fear losing whatever prosperity and security they currently enjoy.³⁰⁶

Similarly, people often put different values on their “decision utility” versus “experience utility,” or have different reactions to imagining things and living them.³⁰⁷ When a strong person tells people, “*I am essential to your wellbeing*,” it is hard for voters to imagine what it would look like to live under a different regime. While they may ultimately find that it is not only possible to live with different leadership, and sometimes fare better under it, imagining this alternate reality can be extremely difficult.

From this perspective, consecutive term limits may tend to disrupt biases of this kind. By mandating a transfer of power to a new president, term limits help counter the effect of endowment effects among voters. By giving voters the opportunity to experience a new leader, consecutive term limits may also help reduce the gap between decision and experience utility.

303. See Baker, *supra* note 8 at 296; Posner & Young, *supra* note 100, at 135; Roger Tangri & Andrew M. Mwenda, *President Museveni and the Politics of Presidential Tenure in Uganda*, 28 J. CONTEMP. AFR. STUD. 31, 33 (2010); Thomas P. Wolf, *Immunity or Accountability? Daniel Toroitich arap Moi: Kenya's First Retired President*, in LEGACIES OF POWER: LEADERSHIP CHANGE AND FORMER PRESIDENTS IN AFRICAN POLITICS 197, 201 (Roger Southall & Henning Melber eds., 2006). In Kenya, for example, many commentators suggest that President Moi over-reached when he nominated Kenyatta as his successor: Kenyatta was relatively inexperienced, and thus not seen as a real threat to Moi's ongoing power and influence. *Id.* at 201. But this ultimately also contributed to the party's loss at the next presidential election, and a major re-alignment in the racial-ethnic make-up of the Kenyan government (of a kind that was clearly disfavored by and unfavorable to Moi). See Nic Cheeseman, *African Elections as Vehicles for Change*, 21 J. DEMOCRACY 139, 144 (2010).

304. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1484 (1998). See generally Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991).

305. Kahneman et al., *supra* note 304, at 194–99.

306. See Corrales & Penfold, *supra* note 31, at 163; Ginsburg et al., *supra* note 1, at 1820.

307. See, e.g., Daniel Kahneman & Richard H. Thaler, *Anomalies: Utility Maximization and Experienced Utility*, 20 J. ECON. PERSP. 221, 221–22 (2006); Daniel Kahneman & Richard Thaler, *Economic Analysis and the Psychology of Utility: Applications to Compensation Policy*, 81 AEA PAPERS & PROC. 341, 343 (1991).

The evidence on presidential reelection rates lends considerable weight to the power of these dynamics. In Latin America, for example, Corrales and Penfold found that between 1998 and 2006, the general reelection rate for sitting presidents was between 83% and 90%, a massive incumbency advantage.³⁰⁸ For former presidents, however, the reelection rate dropped considerably to 40%.³⁰⁹ This was comparable to the election rate of other major party candidates, so that the authors found “no detectable advantage for ex-presidents running for nonconsecutive reelection.”³¹⁰

For example, in Ecuador, Correa left office as a highly popular president.³¹¹ Nonetheless, only eight months after he left office, his preferred position was trounced in Moreno’s successful referendum to reinstate presidential term limits. The result of this referendum has seemingly blocked Correa from making a return to power.³¹² This example suggests the ways in which distance from incumbents can erode the formidable advantages they enjoy while still in office.

C. DESIGNING CONSECUTIVE TERM LIMITS: ONE TERM OR TWO

As noted above in Table 1, there is important variation in the design of consecutive term limits around the world. About half the systems that include this design make presidents leave office at least temporarily after serving only one term in office, and the other systems require a break after two consecutive terms. There appears to be a near-consensus that allowing more than two consecutive terms in office is a bad idea, and only one system in the world with presidential term limits does so.

The choice between one or two consecutive terms raises a basic tradeoff. Allowing only one consecutive term in office may help to reduce the risk that a single president will consolidate enough power to become a threat to democracy and be able to successfully evade term limits. A constant rotation in office prevents the construction of overly strong power bases, even where presidents return to power later, and will instead allow space for competing power centers.

On the other hand, allowing presidents to serve no more than two consecutive terms in office has well-known advantages, as suggested above in Part I.³¹³ A consecutive two-term limit recognizes the significance of executive experience, provides longer time-frames for policy-making and development, and gives voters the opportunity to hold a president *immediately* accountable for his or her policy promises.³¹⁴ In short, presidents who serve two consecutive

308. Corrales & Penfold, *supra* note 31, at 163.

309. *Id.*

310. *Id.*

311. See *Ecuador’s Correa Leaves Office with 62 Percent Approval Rating*, TELESUR (May 18, 2017), <https://www.telesurenglish.net/news/Ecuadors-Correa-Leaves-Office-With-62-Percent-Approval-Rating-20170518-0027.html>.

312. See Ayala, *supra* note 300.

313. See Carey, *supra* note 53, at 127.

314. See Cain & Levin, *supra* note 17, at 178; Streb, *supra* note 246, at 193, 204.

terms are more likely to fulfill their policy promises and are more subject to democratic accountability.

Whether a one or two consecutive term limit will be the better choice depends on a number of other elements of a country's constitutional design. The most obvious one is the length of presidential terms, which globally appear to vary between four and seven years.³¹⁵ The impact of forcing a president to stand down after four years is quite different from forcing them to stand down after six. Thus, while a system allowing two consecutive six-year terms is ill-advised, it may be a good idea to allow consecutive terms if the presidential terms are only four years, as in Brazil and Argentina.³¹⁶

Furthermore, the *relative* length of terms is an important aspect of design. The threat posed by longer stays in office may be lessened if the terms of other key officials, like justices, are longer and more insulated from presidential control.³¹⁷ Thus, it may be reasonable to allow two consecutive terms in office where presidents have limited powers to appoint or influence officials that are intended to check their actions.

A final key feature of consecutive term limits design is how long presidents must sit out for before returning to office. While most systems impose only a one-term break, some, such as Panama, require a longer break of two terms.³¹⁸ Constitutional designers may be more comfortable allowing presidents to serve two consecutive terms in office if presidents must then sit out longer because this helps avoid the consolidation of power and ameliorates the possibility of ex-presidents continuing to run the show through the installation of "shadow presidencies," an issue we explore next.

VI. AVOIDING THE PROBLEM OF SHADOW PRESIDENTS

A temporary or consecutive ban on reelection will be substantively meaningless if a president continues to exercise substantial control over the executive branch as a "shadow" president. In *Federalist 72*, Alexander Hamilton famously relied on this point as an argument against presidential term limits.³¹⁹ He highlighted the dangers to political stability of "half a dozen men who had had credit enough to be raised to the seat of the supreme magistracy, wandering among the people like discontented ghosts, and sighing for a place which they were destined never to possess[.]"³²⁰

Recent decades have witnessed the rise of "shadow presidents" in a range of democratic contexts.³²¹ In some cases, this trend has been unrelated to the

315. BATURO, *supra* note 67, at 46 tbl.2.1.

316. See Corrales & Penfold, *supra* note 31, at 159, tbl.

317. See Ginsburg et al., *supra* note 1, at 1816–17.

318. See Carey, *supra* note 53, at 125.

319. See THE FEDERALIST NO. 72 (Alexander Hamilton) (Yale Univ. Press ed., 2009).

320. *Id.*; see also Carey, *supra* note 53, at 120–21; Ginsburg et al., *supra* note 1, at 1825.

321. See Baker, *supra* note 8, at 297–98.

existence of presidential term limits and instead stems from other features of constitutional design. In Myanmar, for instance, limitations on the capacity of the president to have family members who are citizens of other countries meant that the National League for Democracy (NLD) leader and Nobel Prize Winner Aung San Suu Kyi assumed the role of “state counsellor,” which is effectively a form of shadow presidency.³²²

Other cases, however, have been linked to an attempt to avoid the substantive effect of a presidential term limit. The leading example in recent years was the transfer of the presidency from President Vladimir Putin to President Dmitry Medvedev in 2008 in Russia, as a response to Putin facing constitutional term limits.³²³ Putin, in turn, moved from the presidency to the post of prime minister.³²⁴ While Medvedev took a somewhat different approach to some issues, most observers believe he remained strongly under the influence of Putin.³²⁵ Moreover, the independent support that Medvedev seemed to build from economic liberals and foreign governments during his tenure was ultimately insufficient to persuade or allow him to seek a second term as president.³²⁶ Instead, he stepped aside to allow Putin to run again as soon as he was constitutionally eligible to do so.³²⁷ Not surprisingly, Putin won reelection by a large margin both in 2012 and 2018.³²⁸ Even with constitutional term limits in place, Putin served four terms in office with a one-term break that did little to limit his power.³²⁹

Recent work by Versteeg et al. found that the installation of a puppet ruler is a fairly common method for incumbents to evade term limits.³³⁰ Out of sixty

322. See ပြည်ထောင်စုသမ္မတမြန်မာနိုင်ငံတော် ဖွဲ့စည်းပုံအခြေခံဥပဒေ [REPUBLIC OF THE UNION OF MYANMAR] [CONSTITUTION] May 29, 2008, art. 59(f); Melissa Crouch, *Democracy and Peace Frustrated in Myanmar: Remembering U Ko Ni*, LOWY INST. (Jan. 29, 2018), <https://www.lowyinstitute.org/the-interpreter/democracy-and-peace-frustrated-myanmar-remembering-u-ko-ni>; Euan McKirdy, *New Government Role Created for Myanmar's Aung San Suu Kyi*, CNN (Apr. 7, 2016, 5:03 AM), <https://www.cnn.com/2016/04/06/asia/aung-san-suu-kyi-state-counsellor-role-created/index.html>.

323. See *A Putin-Shaped Throne*, ECONOMIST (Mar. 6, 2008), <https://www.economist.com/europe/2008/03/06/a-putin-shaped-throne>; Ginsburg et al., *supra* note 1, at 1850; David Hearst & Miriam Elder, *How Dmitry Medvedev's Mentor Turned Him into a Lame Duck*, GUARDIAN (Mar. 2, 2012), <https://www.theguardian.com/world/2012/mar/02/dmitry-medvedev-rivalry>; *The Odd Couple*, ECONOMIST (July 10, 2008), <https://www.economist.com/europe/2008/07/10/the-odd-couple>.

324. Seth McLaughlin, *Medvedev vs. Putin: Who's Ruling Russia?* WASH. DIPLOMAT (Nov. 18, 2010), https://washdiplomat.com/index.php?option=com_content&id=6194:medvedev.

325. *Id.*

326. *Id.*

327. Andrew Osborn, *Medvedev Steps Aside for Putin*, FR.24, <https://www.france24.com/en/20110926-2011-09-26-1126-medvedev-putin-russia-elections> (last modified Sept. 26, 2011, 2:26 PM).

328. See Shaun Walker, *2018 Election is No Problem for Putin—But What About 2024?* GUARDIAN (Feb. 6, 2018), <https://www.theguardian.com/world/2018/feb/06/2018-election-is-no-problem-for-putin-but-what-about-2024>.

329. See McLaughlin, *supra* note 324.

330. See Versteeg et al., *supra* note 4.

evasion attempts since 2000, six such attempts, which they call “placeholder presidents,” involved using puppet rulers as the primary method of evasion.³³¹

Perhaps significantly, the “puppet ruler” method has the lowest success rate as only two of the six attempts succeeded.³³² This highlights the difficulty of finding a faithful agent who will be successful in the next election without the incumbent’s reputation and who will remain faithful to the incumbent’s interests, rather than developing his or her own power base. Overall, an effective constitutional design should prevent the implementation of shadow presidents that undermine the value of consecutive term limits.

A. CONSTITUTIONAL DESIGN AND SHADOW RULE

Shadow presidencies are more likely to occur where the incumbent can continue to hold a formal post from which they can exercise power. In Russia, for example, President Putin managed to retain prominence in part because of his continued post as prime minister between 2008 and 2012.³³³ One of the potential disadvantages of semi-presidential, as opposed to pure presidential, systems, in this context, is that it creates two competing executive positions that often results in an ambiguous and shifting distribution of powers, such that officials like Putin and Medvedev can play a game of musical chairs with one another.

More broadly, the threat of shadow presidencies can be ameliorated by imposing a temporary formal ban on the ability of former presidents to hold a range of other elected and appointed offices.³³⁴ Some appointed roles, such as a foreign ambassador, may raise only a limited risk of shadow influence, and be broadly compatible with the development of a strong party and alternative leader domestically.

Alternatively, powerful presidents who leave office due to term limits may attempt to maintain their power by assuming the role of president or chair of their own party. Shadow political influence of this kind will be a direct threat to the development of a true alternative leadership structure within the party.³³⁵ Thus, constitutional designers may consider extending constitutional prohibitions on alternative office-holding by former presidents to formal roles within their own political parties. While the internal organization of political

331. *Id.*

332. *Id.*

333. See *Putin Hints at Becoming Prime Minister Again in 2024*, TIMES OF ISR. (May 26, 2018, 4:16 PM), <https://www.timesofisrael.com/putin-hints-at-becoming-prime-minister-again-in-2024/>; *Vladimir Putin: Russia’s Action Man President*, BBC NEWS (Feb. 27, 2018), <https://www.bbc.com/news/world-europe-15047823>.

334. See Carey, *supra* note 53, at 129–30 (suggesting restrictions in other offices).

335. Carey in fact views this as an argument for rejecting non-consecutive term limits. Carey, *supra* note 53, at 129 (“The perverse incentives within parties generated by punctuated eligibility suggest that if presidents are to be barred from reelection at all—whether after multiple terms or only one—they should be barred permanently.”).

parties has traditionally been left to ordinary democratic politics, constitutional design and doctrine has increasingly moved towards a preference for direct regulation in the constitutional text.³³⁶

Limiting the effectiveness of shadow rule may require limits on the ability of family members of an incumbent president to run for high office. Some constitutions prohibit a sitting president's "blood relatives" from seeking high office. Panama, explored above, is one example.³³⁷

For our purposes, the benefit of a rule preventing family members from running for office as an incumbent is leaving power is obvious. Family members of existing presidents have historically been an important route through which ex-presidents continue to rule behind the scenes and prevent the emergence of new political power bases.³³⁸ Family members are more likely to be loyal to an ex-president than even close, but unrelated, political allies.³³⁹

In Senegal, at the same time he was seeking to extend presidential term limits, President Wade was widely believed to be grooming his son, Karim, to succeed him as president.³⁴⁰ Many observers believed that Wade's decision to introduce the role of vice president was designed to achieve this form of dynastic political control.³⁴¹

Similarly, in Tajikistan, the constitutional changes that allowed President Emomali Rahmon to stay in office indefinitely also lowered the minimum age of presidential candidates from thirty-five to thirty. This was viewed as a bid to allow his 28-year-old son, Rustam, to succeed him as president.³⁴²

In Panama, many observers suggested that Martinelli's support for Arias, on a ticket with Martinelli's spouse, Linares, as vice president, represented an attempt to maintain an ongoing form of "shadow" influence over the presidency. Fifty-six percent of voters in Panama agreed with the statement that the nomination of Linares represented a disguised reelection attempt by Martinelli.³⁴³ Many experts raised similar concerns.³⁴⁴

336. See, e.g., Richard H. Pildes, *Political Parties and Constitutionalism*, in *COMPARATIVE CONSTITUTIONAL LAW* 254 (Tom Ginsberg & Rosalind Dixon eds., 2011); see also Stephen Gardbaum & Richard H. Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 N.Y.U. L. REV. 647, 670–71 (2018); Samuel Issacharoff, *Democracy's Deficits*, 85 U. CHI. L. REV. 485, 485, 501 (2018).

337. See Lees, *supra* note 267; Zamorano, *supra* note 266.

338. See Versteeg et al., *supra* note 4.

339. See *id.*

340. Estelle Cornado, *Senegalese President Abdoulaye Wade's Rise and Rule*, BBC NEWS (Mar. 26, 2012), <http://www.bbc.com/news/world-africa-16905528>.

341. Yarwood, *supra* note 170, at 53.

342. France-Presse, *supra* note 159.

343. Carin Zissis, *Poll Update: Panama's Ruling-Party Candidate Ahead in Possible Close Race*, AM. SOC'Y/COUNCIL AM. (Mar. 28, 2014), <https://www.as-coa.org/blogs/poll-update-panamas-ruling-party-candidate-ahead-possible-close-race>.

344. See Archibald, *supra* note 279; Zovatto, *supra* note 289.

In Argentina, there have been several instances of presidents seeking to prolong their rule via the selection of a spouse. In 1951, Eva Perón considered running as vice president in an attempt to assume the presidency if her husband, President Perón, died in office.³⁴⁵ Eva ultimately withdrew from the race due to ill health.³⁴⁶ Perón's third wife, Isabel Martinez de Perón, however, was able to serve as vice president from 1973 to 1974, and became president upon Perón's death in 1974.³⁴⁷ More recently, the transfer of power between Nestor Kirchner and Cristina Fernandez de Kirchner allowed the Kirchners to control the presidency for a twelve-year period.³⁴⁸

Some family members may have an independent political base, but most will be reliant on the outgoing president for political support. This can make them susceptible to ongoing influence by the outgoing president.

In Argentina, for example, even with her prior record as a successful senator, many commentators believed that President Cristina Fernandez de Kirchner would have stepped down to allow her husband, Nestor Kirchner to seek a further term as president.³⁴⁹ While Nestor Kirchner chose to step down after only one term to allow Fernandez to run in his place in 2007, some analysts perceived that he continued to exercise substantial influence over her presidency.³⁵⁰ It was only after Kirchner died in 2010 that many commentators believed she began to exercise power fully in her own right.³⁵¹

Thus, effective term limits may require temporary limits on the ability of close family members of presidential incumbents to run for high office. Limits of this kind are problematic because they explicitly limit the freedom of political participation of other individuals, including family members, on grounds we generally think are quite suspect: family identity and marriage.

For spouses particularly, a ban of this kind may have gender-discriminatory effects. As the Argentinian and U.S. experience has shown, women have historically been socially encouraged to prioritize the political careers of their

345. *Saga of Eva Peron: 12 Years to Power*, N.Y. TIMES (July 27, 1952), <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/bday/0507.html>.

346. *Id.*

347. Melissa Gomez Hernandez, *Latin American Women in Public Service: Progress, but Not Yet Equality*, in GOVERNING IN A GLOBAL WORLD: WOMEN IN PUBLIC SERVICE 130–31 (Maria J. D'Agostino & Marilyn Marks Rubin eds., 2018).

348. See *Erasing the Kirchner Cult*, ECONOMIST (June 30, 2016), <https://www.economist.com/the-americas/2016/06/30/erasing-the-kirchner-cult>; *First Lady Runs in Argentine Poll*, BBC NEWS (July 20, 2007), <http://news.bbc.co.uk/2/hi/americas/6906563.stm>; Uki Goñi, *Cristina Fernández de Kirchner: Is the Fairytale Ending for Argentina's New Evita?*, GUARDIAN (Feb. 21, 2015, 7:44 AM), <https://www.theguardian.com/world/2015/feb/20/cristina-fernandez-de-kirchner-argentina-president-political-turmoil>; Nick Miroff, *"Kirchnerismo" Politics Set to Outlast Argentina's Outgoing President*, GUARDIAN (July 21, 2015, 6:00 AM), <https://www.theguardian.com/world/2015/jul/21/cristina-fernandez-kirchnerismo-argentina-election>.

349. See Daniel Schweimler, *Kirchner Death Leaves Fernandes to Run Argentina Alone*, BBC NEWS, (Nov. 2, 2010) <https://www.bbc.com/news/world-latin-america-11673444>.

350. *Id.*

351. See Miroff, *supra* note 348; Schweimeir, *supra* note 349.

spouse, even when they also have political ambitions.³⁵² Preventing them from running for president, or at least doing so for a significant period, is thus likely to have a disparate impact based on gender. On the flip side, as we have noted,³⁵³ power transitions between family members are most likely to raise successful threats of shadow presidencies.

While there is a strong, but contestable, case for temporary bans on family members and spouses, we would be reluctant to sweep beyond these well-defined categories to include non-relatives such as the “associates” of an outgoing president. Limits on the electoral eligibility of political associates are more difficult to define with precision than limits on family members. Bans that focus only on close formal advisors, or members of a president’s staff, may be readily overcome by a president selecting a successor from among their informal network of supporters and associates. Conversely, if bans of this kind are drawn too broadly, they may unjustifiably limit rights to freedom of political participation and association. More importantly, such bans undermine a president’s ability to find a successor from within his or her party, and therefore weaken his or her incentive to leave office at the constitutionally appointed time.

The dangers of shadow rule are also likely to be reduced for associates, as compared to family members. Non-familial associates have a stronger chance of developing the kind of independent political reputation and support base over time that is needed to resist attempts at ongoing influence by a former president. Recent history includes a number of examples of trusted or handpicked allies that later turned against their former mentors: consider Correa and Moreno in Ecuador, or Uribe and Santos in Colombia.³⁵⁴ We thus would not recommend extending electoral bars beyond immediate family members of an incumbent president.

B. CREATING INCENTIVES TO AVOID PARTISAN BEHAVIOR

Constitutional term limits will work best when they are combined with other rules that incentivize presidents to leave office and remain outside partisan politics for the relevant period of non-eligibility for reelection. Some of the most successful instances of presidential term limit “enforcement” have occurred in contexts where key players seem to have been mindful of these concerns. As a reward for staying out of partisan politics and allowing a true democratic alternative to emerge, former presidents have been appointed prestigious roles with the UN and the African Union.³⁵⁵

Thus, it could be beneficial to build on this experience and create more formal, global roles for former presidents, as opposed to roles limited to only

352. See Schweimeir, *supra* note 349.

353. See *supra* Subpart VI.A.

354. *Supra* text accompanying note 299; Reyes, *supra* note 88.

355. Roger Southall et al., *Former Presidents in African Politics*, in LEGACIES OF POWER, *supra* note 303, at 1, 12–15.

national governance. Scholars such as Maltz, for example, suggest that presidential term limits could be strengthened by building on the U.S. experience and providing former presidents with a range of benefits, such as generous retirement benefits, assistance in setting up a presidential library or personal foundation, a role in official state ceremonies, and access to state benefits like bodyguards, cars, and airport transport.³⁵⁶

Arrangements of this kind, as Maltz, Southall, Simutanyi, and Daniel note, are likely to work best if they are conditioned on a president having a track record of respect for democratic constitutional norms while in office.³⁵⁷ Otherwise, the entities that offer these arrangements would lose credibility and undermine their capability to motivate potential future members to relinquish domestic political benefits.

But at the same time, too strict an insistence on a perfect human rights and democratic record from former leaders can be counterproductive. If certain historical wrongs permanently bar a president from being considered for membership in such an institution, there will be little incentive for current actors to adhere to democratic constitutional norms.

An even harder question, but one which cannot be avoided, is the impact of constitutional term limits on domestic and international systems of criminal accountability for a range of wrongs that presidents may commit while in office. Too great a weakening of these norms undermines commitments to democratic constitutionalism, human rights, and the rule of law. But too absolute an insistence on such norms can undermine domestic attempts to enforce national constitutional limits and discourage presidents from leaving office.³⁵⁸ Thus, there is, at least in some cases, a relationship between these norms and presidential incentive to evade term limits.

How this balance should be struck is a significant issue largely beyond the scope of this Article. One possibility is the exercise of prosecutorial discretion, which takes into account a former president's compliance with democratic constitutional limits. While compliance with presidential term limits should not shield a president from future criminal prosecution, a president's peaceful transfer of power may be a relevant factor in deciding whether to ultimately prosecute them.

VII. ALTERNATIVE PROPOSALS

We have laid out the case for why systems vulnerable to term limit evasion might want to consider using consecutive, rather than absolute, bars on reelection. We have also analyzed some of the constitutional design choices relevant to that decision.

356. Maltz, *supra* note 1, at 140.

357. See Maltz, *supra* note 1, at 129; Southall et al., *supra* note 355, at 5.

358. See Southall et al., *supra* note 355, at 18–21.

In this Part, we briefly consider three alternative solutions described in recent work on constitutional design: the proposal to scrap term limits completely, the proposal to rely on popular enforcement of term limits, and the proposal to require that any loosening to term limits may only be made prospectively so that it does not benefit the incumbent.

A. SCRAPPING TERM LIMITS

In response to the problem of non-compliance with presidential term limits, some have argued for the removal of presidential term limits altogether and that other forms of control should be relied upon. Smith, Crowley, and Leguizamón, for example, suggest that age and death from natural causes are effective limits on presidential terms.³⁵⁹

An alternative approach could be to impose formal age limits on presidents, although we note that these kinds of provisions can create similar pressures for evasion as term limits themselves.³⁶⁰ Many presidents seeking a third or fourth term in Africa, for example, are already in their seventies and eighties. Cameroon's President Paul Biya was seventy-five at the time he sought a third term in office and Congo-Brazzaville's President, Sassou-Nguesso, was seventy-one when he sought another term.³⁶¹ In the Congo, in order for President Sassou-Nguesso to remain in office, the Constitution was changed so that the two-term limit was removed, and the maximum age was extended for presidential candidates.³⁶²

Furthermore, reliance on a president's eventual mortality is an insufficient response because it does not take into account young, healthy presidents who are serving during their prime. In Africa, Rwanda's President Paul Kagame was fifty-seven when the Parliament amended the Constitution to allow him to seek two further consecutive terms in 2015.³⁶³ Burundi's President Nkurunziza was only fifty-four when voters approved the repeal of term limits that extended the length of presidential terms in 2018.³⁶⁴ Similarly, in Burkina Faso and Madagascar, Presidents Blaise Compaoré and Marc Ravalomanana were in their early sixties when they reached the end of their second terms.³⁶⁵

359. See Smith et al., *supra* note 21.

360. See *Turkmenistan Removes Legal Barrier to Leader's Indefinite Rule*, REUTERS (Sept. 13, 2016, 11:45 PM), <https://www.reuters.com/article/turkmenistan-president-idUSL8N1BQ0NR>. In Turkmenistan, for example, voters recently voted to repeal the age limit (of seventy) on the presidency, thereby allowing President Gurbanguly Berdimuhamedov to stay in power indefinitely. See *id.*

361. Ross, *supra* note 125.

362. Tull & Simons, *supra* note 53, at 80, 93.

363. Adam Agustyn, *Paul Kagame: President of Rwanda*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Paul-Kagame> (last updated Sept. 27, 2019).

364. Dahir, *supra* note 138.

365. Amy McKenna, *Blaise Compaoré: President of Burkina*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Blaise-Compaore> (last visited Jan. 24, 2020); *Marc Ravalomanana: President of Madagascar*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Marc-Ravalomanana> (last visited Jan. 24, 2020).

The same is true elsewhere. In Latin America, Rafael Correa was only fifty-two when the Constitution was amended in 2015 to eliminate presidential term limits.³⁶⁶ Bolivia's Evo Morales is only fifty-nine years old, has held power continuously since 2006, and now will be able to run for office indefinitely.³⁶⁷ Turkmenistan also recently voted to remove the age limit for the presidency, allowing fifty-nine-year-old President Gurbanguly Berdimukhamedov to continue to run for office in future elections.³⁶⁸

Ginsburg, Melton, and Elkins suggest that informal norms or conventions may be a better alternative to formal constitutional limits.³⁶⁹ For example, George Washington famously retired from the presidency after two terms, thereby creating a *de facto* convention that a president would only serve two presidential terms.³⁷⁰ This was well before the adoption of the Twenty-Second Amendment.³⁷¹ Some of the most notable examples of voluntary presidential retirement in Africa occurred in South Africa and Tanzania before or in the absence of formal, relevant term limits.³⁷² In Tanzania especially, this seems to have contributed to an ongoing "culture" of voluntary presidential retirement.³⁷³ President Julius Nyerere voluntarily stepped down from the presidency of Tanzania in 1985 after a lengthy period as president.³⁷⁴ Both Presidents Benjamin Mkapa and Jakaya Kikwete followed the same pattern and stepped down at the end of the two-terms permitted by the Constitution in 2005 and 2015, respectively.³⁷⁵ There are encouraging signs that the current Tanzanian President John Magufuli will take the same approach and leave office by no later than 2025, rather than support calls to repeal or remove current term limits.³⁷⁶

In some contexts, there are good arguments for making constitutional limitations informal and voluntary, rather than formal and legally mandated. Government officials may be more likely to comply with certain requirements when they are trusted to do so, instead of being constitutionally directed or

366. *Rafael Correa, President of Ecuador*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Rafael-Correa> (last visited Jan. 24, 2020).

367. *Evo Morales, President of Bolivia*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Evo-Morales> (last visited Jan. 24, 2020).

368. *Turkmenistan Removes Legal Barrier to Leader's Indefinite Rule*, *supra* note 360.

369. Ginsburg et al., *supra* note 1, at 1859.

370. Ginsburg et al., *supra* note 1, at 1834; Maltz, *supra* note 1, at 130–31.

371. Ginsburg et al., *supra* note 1, at 1834–35; Maltz, *supra* note 1, at 130–31.

372. Tull & Simons, *supra* note 53, at 88.

373. *Id.* This may reflect path-dependencies in constitutional practice. See generally Ozan O. Varol, *Constitutional Stickiness*, 49 U.C. DAVIS L. REV. 899 (2015) (generally discussing constitutional path dependency).

374. Tull & Simons, *supra* note 53, at 88.

375. *Id.*

376. Jerry Bambi, *Presidential Term Limit Debate Put to the Rest in Tanzania*, AFR. NEWS (Jan. 17, 2018), <http://www.africanews.com/2018/01/17/presidential-term-limit-debate-put-to-rest-in-tanzania-the-morning-call/>; Fumbuka Ng'wanakilala, *Tanzania's Magufuli Rejects Calls to Extend Rule Beyond Two-Term Limit*, REUTERS (Aug. 7, 2017, 9:15 AM), <https://www.reuters.com/article/us-tanzania-politics/tanzanias-magufuli-rejects-calls-to-extend-rule-beyond-two-term-limit-idUSKBN1ANIYT>.

mandated to act a certain way. This reflects broader human tendencies to reciprocate expressions of trust and the relatively weak effect of constitutional constraints.³⁷⁷

It is dangerous, however, to rely on informal norms to encourage or enforce constitutional term limits. The fact that presidents are facing the end of their term, and thus the end of an ongoing political give-and-take relationship, gives rise to the problem of constitutional non-compliance in the first place. Often, there will be exogenous factors, such as war, or other political or economic crises, that may encourage a president to remain in office and depart from informal conventions of this kind. It was arguably pressures of this kind that led President Franklin Delano Roosevelt to overlook the norm of a two-term presidency and stand for a third and then fourth presidential term during the Great Depression and World War II.³⁷⁸ Similar arguments about the need for economic and political stability have been used to justify the repeal of term limits in other contexts.

Ginsburg, Melton, and Elkins have also suggested that it may be preferable to replace term limits with a form of “super-majoritarian” escalator, whereby presidents are required to gain increasing majorities the longer they are in office.³⁷⁹ However, such a proposal raises problems of incentives that could be even more dramatic than those posed by an absolute ban on reelection. Presidents who win a majority of the popular vote may have weak incentives to accept the results of an election that they fail to win with a sufficient supermajority.³⁸⁰ Provisions of this kind therefore raise the risk of presidents engaging in forms of constitutional over-staying that are even more dangerous to democracy than the circumvention of term limits.

B. POPULAR ENFORCEMENT OF TERM LIMITS

In recent work, we argue that enforcement of “tiered” systems of constitutional change, such as eternity clauses that protect provisions like term limits may be more likely to occur through popular means, rather than resorting to the courts.³⁸¹ Versteeg et al. take this position forcefully, noting that there has only been one successful example since 2000 of a court blocking an attempt to change a constitutional term limit.³⁸² In 2010, the court successfully blocked

377. Compare Rosalind Dixon, *Constitutional Drafting and Distrust*, 13 INT’L J. CONST. L. 819, 837 (2015), with Rosalind Dixon, *Constitutional Design Two Ways: Constitutional Drafters as Judges*, 57 VA. J. INT’L L. 1, 31 (2017).

378. Carey, *supra* note 53, at 121.

379. Ginsburg et al., *supra* note 1, at 1861–63.

380. *Id.*

381. Dixon & Landau, *supra* note 10, at 507 (“Given the challenges associated with judicial enforcement of limits on amendment in many common circumstances, constitutional designers and scholars should also be attuned to the possibility of nonjudicial routes through which amendment tiers might gain force.”).

382. Versteeg et al., *supra* note 4.

President Uribe's attempt to amend his presidential term limit.³⁸³ The Colombian case, however, relied on specific conditions that may not commonly be present at moments of stress where incumbents seek to eliminate term limits. First, in that case, the court retained independence and power and had not been packed or otherwise placed under the thumb of the president.³⁸⁴ Second, Uribe's congressional coalition was quite fragmented and many of his rivals within his movement welcomed the decision because it created a new opportunity for them.³⁸⁵

It is common for courts to support incumbents seeking to stay in office beyond their constitutionally appointed term by removing term limits.³⁸⁶ Indeed, as we noted above, the courts are a fairly common instrument used by incumbents to stay in power.³⁸⁷

In contrast, there have been failed attempts to change presidential term limits because of popular protests. In Paraguay, as noted above, an attempt to extend term limits in a clearly unconstitutional manner was scrapped because of massive protests backed by the Catholic Church and a broad swath of civil society.³⁸⁸ In Ecuador, similarly, in the face of huge protests, Correa assented to the crucial provision requiring that he stand down in 2017.³⁸⁹ Similar dynamics have worked in Africa, for example in Burkina Faso in 2014 and Malawi in 2002.³⁹⁰

As a descriptive matter, there is evidence that popular involvement is often critical to halting attempts to evade or to change presidential term limits.³⁹¹ The trouble is determining how to leverage popular involvement into principles of constitutional design. Most of the factors that determine levels of popular uprising are extrinsic to constitutional design. In our earlier paper, we have ideas for how designers might make popular mobilization around constitutional protections for term limits especially likely.³⁹²

One solution is to design term limit provisions such that any ambiguity is removed. Provisions that unequivocally identify the term limit by name and that clearly require a stringent, heightened procedure to change the term limit can better counteract the weaknesses of vague constitutional designs.³⁹³ The latter kind of design is really a delegation to courts through legalistic language, and as noted, courts are not to be trusted during these situations.

383. See Corte Constitucional [C.C.] [Constitutional Court], febrero [Feb.] 2, 2010, Expediente [Decision] C-141/10 (Colom.).

384. Dixon & Landau, *Tiered Constitutional Design*, *supra* note 10, at 505.

385. *Id.*

386. See Ginsburg et al., *supra* note 1, at 1811, 1823.

387. See *supra* Part III.

388. See *supra* text accompanying notes 184–187.

389. See *supra* text accompanying notes 144–148.

390. See Versteeg et al., *supra* note 4.

391. See, e.g., *supra* text accompanying notes 171–177, 186.

392. See Dixon and Landau, *supra* note 10, at 478–79.

393. *Id.* at 510–11.

A second possibility is to require popular referenda to change term limits. There are recent examples of popular presidents losing referenda to extend or eliminate term limits, including President Chavez of Venezuela in 2007 (although Chavez later succeeded in 2009), and President Morales of Bolivia in 2015 (although Morales later convinced a court to remove the limit).³⁹⁴ Presidents Chavez and Morales were popular but their proposals were less so. However, referenda are famously malleable instruments in regimes where democracy is absent or threatened.³⁹⁵ There are plenty of other cases where referenda to eradicate term limits passed overwhelmingly. At any rate, voting in a popular referendum does not have the same effect as the sorts of popular protests that have successfully prevented a president's attempt to evade term limits.

The bottom line is that we have some distance to go in identifying how constitutional design can support popular mobilization in these kinds of moments. It is likely that constitutional design can only do so much. Proposals to encourage popular mobilization, however, are fully concordant with our own design proposal in this Article.

C. PROSPECTIVE-ONLY RULES OF CHANGE

A final alternative solution focuses squarely on constitutional design. One possibility is for constitutions to include a rule allowing changes to term limits, but also stating that any changes will only take effect after the incumbent has left office. Consider, for example, the constitution of South Korea, which states that “[a]mendments to the Constitution for the extension of the term of office of the President or for a change allowing for the reelection of the President shall not be effective for the President in office at the time of the proposal for such amendments to the Constitution.”³⁹⁶

This provision states in clear language that any change to the presidential term length or limit will not benefit the president who is the incumbent at the time the change is made.³⁹⁷ Other constitutions may achieve a similar effect through the use of temporal restrictions on amendments. Where constitutional changes to term limits take a long time to carry out or require sequential votes with intervening elections, they may also make it unlikely or impossible for the current president to benefit from the change.³⁹⁸

There is a certain appeal to these kinds of rules. They ensure that changes to term limits occur because of their long-term benefits and costs, and not as a way to help a current president remain in office. They seek to ensure, in other words, that constitutional changes to term limits occur behind something of a

394. *Id.* at 501.

395. *Id.*

396. 1987 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 128(2) (Oct. 29, 1987) (S. Kor.).

397. *Id.*

398. For a discussion of temporal restrictions on sensitive amendments, see Dixon and Landau, *supra* note 10, at 502–03.

veil of ignorance, such that the beneficiary of the change remains ambiguous or unknown. These kinds of constitutional provisions may be very useful throughout constitutional law and remain understudied. The inclusion of a prospective-only rule for constitutional change is also complementary to our own proposal. A bar against consecutive terms can be bolstered if placed on a higher tier with a prospective-only rule for change.

However, we are skeptical that a provision like the South Korean one, standing alone, will prove to be a robust barrier against term limit abuse. While it creates an obstacle for presidents seeking to remain in power, it does little to ameliorate the powerful incentives that presidents often have to evade term limits. As a result, presidents may turn to substitutes for formal amendments to achieve their goals. For example, presidents could turn to the courts, which could reinterpret the provision or remove it. There are arguments, grounded in principles of equality or on the will of voters, that would potentially allow courts to do so.³⁹⁹

Relatedly, we note that prospective application of term limits is also a double-edged sword that has often been abused by incumbents. Would-be authoritarian leaders in several countries have allowed new term limits to go into effect, but have then either included explicit provisions stating that the new limits apply only prospectively, or convinced courts to adopt similar interpretations.

In Angola, Equatorial Guinea, and Zimbabwe, for example, term limits were only added to the constitution on a prospective basis in 2010, 2011, and 2013, when Presidents Dos Santo, Mugabe, and Obiang Nguema had all been in power for more than two decades.⁴⁰⁰ In Sudan, a term limit was introduced in 2005, but was not implemented until 2010. This allows President al-Bashir, who has been in power since 1993, to potentially remain in power until 2020.⁴⁰¹

In Burkina Faso, President Compaoré, who has been in power since 1983, succeeded in removing constitutional term limits in 1997.⁴⁰² He agreed to re-introduce them in 2000 but again, only on a prospective basis so he could remain in office until at least 2015.⁴⁰³ In Rwanda, the term limit changes introduced in 2015 allowed President Kagame to serve an initial “transitional” seven-year term

399. For example, in Venezuela the Supreme Court held that a legislative effort to shorten presidential terms, in a way that would apply to the incumbent President Maduro’s current term, would be an unconstitutional constitutional amendment, using these kinds of arguments. See José Ignacio Hernández G., *La Desnaturalización de la Justicia Constitucional en Venezuela Durante el 2016* [The Denaturalization of Constitutional Justice in Venezuela During 2016], LA UNIÓN [THE UNION] 1, 22 (2016) (Venez.).

400. Tull & Simons, *supra* note 53, at 91.

401. *Id.* at 91 fig.3.

402. *Id.* at 91–92.

403. *Id.* at 92.

beginning in 2017, followed by two further five-year terms,⁴⁰⁴ thereby potentially allowing him to stay in office for a total of thirty-one years.⁴⁰⁵

Constitutional courts have sometimes adopted a similar interpretation of term limits at the behest of incumbents. In Bolivia, for example, well before Morales sought to loosen term limits, the Bolivian Constitutional Court held that the two-term limit in the new 2009 Constitution did not apply to Morales's term.⁴⁰⁶ Effectively, this allowed Morales to serve three consecutive terms in office, rather than two terms, before even seeking to change the limit. Similarly, in Burundi, the 2015 decision of the Constitutional Court on term limits effectively postponed their effect so they only became binding after an additional five years in office.⁴⁰⁷

The pervasiveness of these abuses of prospective application of term limits may reduce our confidence in their viability in constitutional design. Ideally, there would be a norm mandating that loosening of a presidential term limit must be prospective such that any tightening of the term limit could be applied to incumbents. At the moment, however, no such norm exists.

CONCLUSION

Timing is one of the key mechanisms available to constitutional designers in entrenching democracy. We have noted elsewhere that "tiered" systems of constitutional change that make certain kinds of change more costly work largely by raising the political costs, or level of political support, needed for anti-democratic constitutional change.⁴⁰⁸ This has the effect of both deterring and delaying such change. Delay can also be built into constitutional design in a more explicit sense; double passage requirements and similar devices may slow the actions of would-be authoritarians, and this may create space for them to lose power before they can consolidate control.

Delay, by itself, does not guarantee that democracy will survive. It may simply slow an inevitable process of democratic backsliding. However, delay can help create a window for broader social or political change, which can undermine democratic support for would-be authoritarian actors or policies.

A similar logic applies to temporary presidential term limits. Relatively "weak" bans on consecutive reelection are more likely to be effective than absolute bans on all reelection because they deal with the constitutional end-game problem we have identified. They give incumbents hope of a potential return to power later, which may make those incumbents less likely to seek

404. *Rwandans Vote on Allowing Third Kagame Presidential Term*, BBC NEWS (Dec. 18, 2015), <http://www.bbc.com/news/world-africa-35125690>.

405. *Rwanda Changes Constitution to Allow President to Extend His Rules Until 2034*, *supra* note 131; *Rwanda: Paul Kagame Is in Line to Stay in Office Until 2034*, *supra* note 132.

406. *Bolivia: New Law Backs President Evo Morales Third Term*, BBC NEWS (May 21, 2013), <https://www.bbc.com/news/world-latin-america-22605030>.

407. Tull & Simons, *supra* note 53, at 92.

408. See Dixon & Landau, *supra* note 83, at 613–14 (arguing that doctrines raising the cost of constitutional change sometimes act as speed bumps).

extraordinary measures to alter a term limit through either formal or informal means.

At the same time, such bans protect democracy because they remove presidents from power at least for a set period of time. This delay, in turn, helps reduce the actual chances a president will be elected to a third or fourth term by creating space for opposition figures and independent voices within the president's own party. The experience of presidential alternation in Tanzania, for example, has not been one of alternation between parties, as all three presidents that have stepped down at the expiration of their term were from the same political party.⁴⁰⁹ However, the experience nonetheless helped build a stronger ruling party, as well as democratic traditions and norms.⁴¹⁰ Furthermore, even if a president is eventually reelected to a non-consecutive term, they will likely pose less of a threat to democracy than if they had held power continuously because the time they spend out of office reduces their ability to accumulate formal and informal forms of control.

In this light, the U.S. presidential term limit is emblematic only in certain respects and poorly designed in others. While it lacks the special form of entrenchment or tiered constitutional design found in many modern orders, the term limit is nonetheless highly entrenched because Article V itself makes all formal constitutional change of the U.S. Constitution extremely difficult.⁴¹¹ We agree with others who have argued that the formal amendment of the U.S. term limit provision for the benefit of a would-be authoritarian president is unlikely.⁴¹² In most political conditions, political minorities would maintain sufficient power at the congressional or state-legislative level to block the proposal.⁴¹³ Even in the worst case, the legislature would likely slow the proposal, since the United States' process is time-consuming.⁴¹⁴

However, this design may actually exacerbate, rather than ameliorate, the end game problem identified in this article. Would-be authoritarian presidents cannot formally amend the term limit but will still seek to stay in power. Thus, they have very strong incentives to seek other means of change, such as manipulation of the judiciary or wholesale replacement of the constitution. Thus, the design of term limits in the U.S. Constitution may inadvertently raise risks of authoritarianism. Perhaps most important, this feature makes the U.S. design a perilous model for countries abroad. In many contexts, we have argued, a weaker, consecutive ban on holding power for more than two terms may make more sense than an absolute bar to reelection.

409. See Baker, *supra* note 8, at 298; Posner & Young, *supra* note 100, at 128–29; Southall et al., *supra* note 355, at 14; Vandeginste, *supra* note 139, at 59.

410. Tull & Simons, *supra* note 53, at 88.

411. See, e.g., Lutz, *supra* note 195, at 362 (arguing that the U.S. Constitution is the most difficult in the world to amend).

412. See, e.g., Ginsburg & Huq, *supra* note 3, at 143–44 (arguing that the rigidity of Article V makes formal amendment unlikely as part of a program of democratic retrogression in the United States).

413. *Id.* at 145–46.

414. *Id.* at 143–44.
